83-997

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

TRANS WORLD AIRLINES, INC.,

Petitioner,

—v.—

HAROLD H. THURSTON, CHRISTOPHER J. CLARK, C.A. PARKHILL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether specific intent to discriminate is necessary to establish a "willful" violation under the Age Discrimination in Employment Act, an issue as to which the Courts of Appeals are sharply divided?

2. Whether a labor union found to have jointly violated the Age Discrimination in Employment Act with an employer can nonetheless be absolved as a matter of law from any liability for back pay?

3. Whether the Age Discrimination in Employment Act requires an employer to accommodate employees for an age-related reason merely because it provides accommodation for non-age-related reasons?

PARTIES

Trans World Airlines, Inc., Harold H. Thurston, Christopher J. Clark, C.A. Parkhill and the Air Line Pilots Association, International were all parties to the decision sought to be reviewed here. In addition, the Equal Employment Opportunity Commission and Nicholas Vasilaros, *et al.*, were intervenors in the court below.

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Petitioner Trans World Airlines, Inc. ("TWA")* respectfully prays that a writ of certiorari issue to review the judgment (with one judge dissenting) of the United States Court of Appeals for the Second Circuit entered on August 1, 1983, reversing the judgment by the district court.

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* As required by Rule 28.1 of this Court, TWA states that it is presently a subsidiary of Trans World Corporation, of which Hilton International Co., Canteen Corporation, Spartan Food Systems, Inc. and Century 21 Real Estate Corporation are also subsidiaries.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 713 F.2d 940 and appears in the Appendix hereto at page A-1. The opinion of the United States District Court for the Southern District of New York is officially reported at 547 F. Supp. 1221 and appears in the Appendix hereto at page A-44.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1983. Rehearing and suggestion for rehearing in banc was denied on November 10, 1983. This petition is filed within 90 days of the date of denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 4(a) of the Age Discrimination in Employment Act ("ADEA") provides (29 U.S.C. § 623(a)):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

Section 4(c) of the ADEA provides (29 U.S.C. § 623(c)):

> It shall be unlawful for a labor organization—
>
> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;
>
> (2) to limit, segregate, or classify its membership, or to classify or fail to refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Sections 4(f)(1) and (2) of the ADEA provide (29 U.S.C. §§ 623(f)(1) and (2)):

> It shall not be unlawful for an employer, employment agency or labor organization—
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 12(a) of this Act because of the age of such individual.

Section 7(b) of the ADEA provides (29 U.S.C. § 626(b)):

The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.

Section 12(a) of the ADEA provides (29 U.S.C. § 631(a)):

> The prohibitions in this Act shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

Part 121.383(c) of the Federal Air Regulations provides (14 C.F.R. § 121.383(c)):

> No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday. No person may serve as a pilot on an airplane engaged in operations under this part if that person has reached his 60th birthday.

STATEMENT OF THE CASE

This case had its genesis in the passage of the 1978 amendments to the ADEA which were signed into law on April 6, 1978 (P.L. 95-256). These amendments prohibited, *inter alia*, an employee's involuntary retirement before the age of 70 by reason of a bona fide employee benefit plan. The ADEA, however, still allowed retirement before the age of 70:

> (1) where "age [was] a bona fide occupational qualification reasonably necessary to the normal operation of the particular business;" and
>
> (2) where the retirement was in accordance with (i) "the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan;" (ii) was "not a subterfuge to evade the purposes of [the ADEA];" and (iii) was not as a result "of the age of [the] individual." (29 U.S.C. § 623(f)).

As a result of these amendments to the ADEA, TWA began a review of its pilot collective bargaining agreement (which included its retirement plan) to ensure that the Company was complying with the new statute. Insofar as Captains and First Officers (co-pilots) were concerned, retirement from these positions at age 60 was mandated by a regulation of the Federal Aviation Administration ("FAA"). That regulation provides "[n]o person may serve as a pilot . . . if that person has reached his 60th birthday" (14 C.F.R. § 121.383(c)), and such an age limitation is a "bona fide occupational qualification" ("BFOQ") for the purposes of the ADEA (A-7 to A-8).

However, there is also a third cockpit crewmember on most jet aircraft. He is the Flight Engineer, and there is no FAA

regulation limiting that position to persons below the age of 60 (A-6 to A-7). Accordingly, TWA announced on August 10, 1978 that "any cockpit crew member who [was] in a Flight Engineer status at age 60 may not be compelled to retire." TWA's policy also recognized that those who wanted to work beyond age 60 would "be governed by the provisions of the current Working Agreement. . ." (J.A. 425).*

On the same day, August 10, 1978, the pilot's union, the Air Line Pilots Association ("ALPA"), filed suit against the Company in *ALPA* v. *TWA*.** The complaint alleged that TWA had gone too far by allowing anyone to serve past age 60 in alleged breach of the collective bargaining agreement (J.A. 108-15). Soon thereafter, a group of TWA Captains mandatorily retired at age 60 because there were no Flight Engineer vacancies prior to their 60th birthday also filed suit in *Thurston* v. *TWA and ALPA*. Their complaint alleged, *inter alia*, that TWA's "age 60" policy had not gone far enough to accommodate them and was therefore in violation of the ADEA (J.A. 58-73). The Equal Employment Opportunity Commission ("EEOC") was subsequently permitted to intervene in *Thurston* as a plaintiff-intervenor purporting to represent others similarly situated,*** and *Thurston* was consolidated with *ALPA* for decision.

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* References to "J.A. ____" are to the Joint Appendix filed in the Second Circuit. Unless otherwise noted, emphasis in quotations is added.

** A group of "career" or permanent Flight Engineers, Nicholas Vasilaros, *et al.*, was also permitted to intervene in *ALPA* v. *TWA* on the side of the Company (A-49 n.3).

*** In view of this Court's recent decision in *INS* v. *Chadha*, ____ U.S. ____, 103 S. Ct. 2764 (1983), and the subsequent decision in *EEOC* v. *Allstate Ins. Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), a threshold question arises whether the EEOC has the authority to enforce the ADEA. In filing this petition, TWA reserves all rights in this regard.

By an order dated September 13, 1982, Judge Duffy of the Southern District of New York granted TWA's motion for summary judgment in both *ALPA* and *Thurston* (A-44 to A-61). Insofar as the *Thurston* and EEOC plaintiffs were concerned, Judge Duffy ruled that they "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

On appeal, the panel unanimously affirmed Judge Duffy's decision in *ALPA* v. *TWA* (A-13 to A-21). However, a majority of the panel reversed his holding in *Thurston* and directed that summary judgment be entered in favor of the *Thurston* and EEOC plaintiffs. Judge Mansfield, in an opinion joined by Judge Waterman, held that "because TWA routinely accommodates other employees who seek to downgrade to flight engineer for *non-age* reasons and has failed to come forward with a permissible reason for its refusal to accord the *same* treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim." (A-31).

In fashioning its relief against TWA, the majority ruled that TWA's actions constituted a "willful" violation under Section 7(b) of the ADEA (29 U.S.C. § 626(b)), thereby entitling plaintiffs to "[l]iquidated or double damages" (A-33). The court's finding of "willfulness" was predicated on its view that "in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). Significant liability for liquidated damages was thus imposed against TWA even though there had never been an evidentiary hearing on the issue of intent or "willfulness."

In its initial decision, the majority also imposed money liability against ALPA. It found that while the statute "precludes a monetary damage award against ALPA," the plaintiffs were "entitled to recover back pay, an equitable remedy, against the union." (A-34). However, in a subsequent "Errata Sheet" released after the denial of the petitions for rehearing (A-37 to A-39),* the court deleted the entire paragraph relating to its prior holding that the plaintiffs were entitled to recover back pay from ALPA. This deletion resulted in making TWA, the employer defendant, solely liable for all payment of money under the court's ruling.

In dissent, Judge Van Graafeiland noted that the majority's attempt to compare TWA's treatment of its employees for non-age reasons with its employees for age reasons was "like comparing apples with oranges." He did not "believe" that was what "Congress intended" by its enactment of the ADEA (A-35 to A-36). He concluded:

> "Apparently, TWA is the only trunk airline that *voluntarily* has permitted pilots over 60 to continue working as flight engineers. *Instead of receiving commendation for what it has done*, TWA is held liable as a matter of law for age discrimination." (A-36).

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* The actual "Errata Sheet" is printed at A-37, and the resulting changes in the decision are reflected in the markings made by TWA for the convenience of this Court at A-38 to A-39.

REASONS FOR GRANTING THE WRIT

I

THIS COURT SHOULD RESOLVE THE CLEAR CONFLICT IN THE COURTS OF APPEALS AS TO WHAT CONSTITUTES A "WILLFUL" VIOLATION UNDER THE ADEA

This case brings to this Court the perfect opportunity to resolve a clear conflict among Circuits and establish uniformity as to what constitutes a "willful" violation under the ADEA, thereby entitling a plaintiff to liquidated damages. Absent any evidentiary hearing and without even benefit of briefing on the subject, the majority below has adopted a standard of "willfulness" under Section 7(b) of the ADEA which is broader than any other Circuit Court of Appeals and which clearly contravenes the standard adopted by at least two other Circuits.

As the court below noted, liquidated damages under the ADEA are "double damages . . . equal to the pecuniary losses sustained by way of lost wages" (A-33). Under Section 7(b) of the ADEA (29 U.S.C. § 626(b)), Congress has mandated that "liquidated damages shall be payable *only* in cases of *willful* violations of this Act." Congress has thereby clearly established a two-tiered level of liability under the ADEA, one non-willful and one willful.*

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* Accord *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978), where this Court stated that "Congress altered the circumstances under which such awards [for liquidated damages] would be available in ADEA actions by mandating that such damages be awarded *only where* the violation of the ADEA is willful." It should be noted that certiorari was granted in *Lorillard*, this Court's first examination of the ADEA, "to resolve the conflict in the Circuits" (*id.* at 577) on whether the ADEA provided a right to jury trial. Since then, this Court has dealt with only a few procedural questions under the ADEA. See, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979). This petition, if granted, would allow the Court to provide some much-needed substantive interpretation of the ADEA.

Nevertheless, the majority below found that in order to establish willfulness "in a case based on discriminatory treatment, . . . it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (A-33). The majority further emasculates the statutory requirement of "willful[ness]" by indicating that any time there is a finding of disparate treatment (even when, as here, it is admittedly inferred) (A-24), liquidated damages *automatically* follow so long as the defendant is *merely aware* of the existence of the statute. This results from the majority's view that " '[i]n a discriminatory treatment case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason.' " (A-33 to A-34) (emphasis in original).*

The majority has thereby adopted a standard for "willfulness" under the ADEA where the penalty of liquidated damages will follow *a fortiori* from a finding of disparate treatment. This is clearly contrary to at least two Circuits which hold that in order to establish "willfulness" under the ADEA, there must be a finding the defendant *knew* he was actually *violating* the statute.

In the First Circuit, an " 'act is done "willfully" if done voluntarily and intentionally, *and with the specific intent to do something the law forbids*; that is to say, with bad purpose either to disobey or disregard the law.' " *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1020 n.27 (1st Cir. 1979). The Seventh Circuit has agreed "that a finding of willfulness should be *only if* there is some showing as to the defendant's *knowledge of the illegality* of his actions." *Syvock* v. *Milwaukee Boiler Mfg.*

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* After quoting the test cited above, the majority's decision simply states: "Applying these principles, TWA was clearly aware of the 1978 ADEA amendments; indeed it was required to post them, 29 U.S.C. § 627." (A-34). No finding was made that TWA knowingly acted with specific intent to discriminate, and indeed, it is undisputed that at least 83% of those Captains seeking to serve as Flight Engineers beyond age 60 have succeeded in that regard (A-61 n.8).

Co., 665 F.2d 149, 155 (7th Cir. 1981). TWA submits that these cases correctly interpret the ADEA and that the proper standard for "willfulness" is that an act be done "with the specific intent to do something the [ADEA] forbids." *Loeb, supra.*

The merit of such a test was recognized by the court in *Syvock* (pp. 154-55). There, the court specifically noted how its "focus on the defendant's state of mind" differed from the misnomered "deliberate, intentional, and knowing" test adopted by the Third Circuit in *Wehr* v. *Burroughs Corp.*, 619 F.2d 276, 283 (3d Cir. 1980), and followed by the Ninth Circuit in *Kelly* v. *American Standard, Inc.*, 640 F.2d 974, 980 (9th Cir. 1980), and the Sixth Circuit in *Blackwell* v. *Sun Electric Co.*, 696 F.2d 1176, 1183-85 (6th Cir. 1983). In these Circuits, it "is sufficient to prove" willfulness by showing that "the company discharged the employee because of age and that the discharge was voluntary and not accidental, mistaken or inadvertent." *Wehr, supra*, 619 F.2d at 283.*

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* Alternatively, the *Wehr* court said that "it would also be sufficient to prove that the discharge was precipitated in reckless disregard of consequences." (*Id.*) This view has been adopted by the Sixth Circuit in *Blackwell, supra*, 696 F.2d at 1184, and apparently by the majority below (A-33). However, it has been specifically rejected by the Ninth Circuit in *Kelly, supra*, 640 F.2d at 980 n.7.

Other Circuits have adopted different standards. The Fourth Circuit has "recently rejected" the *Syvock* standard and merely requires that " 'an employer acts willfully and subjects himself to [liability] if he knows or has reason to know, that his conduct is governed by [the ADEA].' " *Crosland* v. *Charlotte Eye, Ear and Throat Hospital*, 686 F.2d 208, 217 (4th Cir. 1982). On the other hand, the Fifth Circuit in *Hays* v. *Republic Steel Corp.*, 531 F.2d 1307, 1311 (5th Cir. 1976), has indicated that an employer has a defense of "good faith" to any "willful" violation claim. This defense, however, has been specifically rejected by at least three other Circuits. See *Kelly, supra*, 640 F.2d at 981-82, and cases cited therein.

For a good summary of the confusion generated by the divergent standards of "willfulness" in the different Circuits, see *Koyen* v. *Consolidated Edison Co.*, 560 F. Supp. 1161, 1165 n.24 (S.D.N.Y.

(Footnote continued on following page)

These three Circuits all adopted such a standard after a full trial. In contrast, the majority here has adopted a standard requiring even less of a showing of discriminatory animus without any such trial and admittedly on the basis of nothing more than "an inference of discriminatory motive" (A-24).*

This standard of imposing liability for willfulness and double damages simply upon proof of disparate treatment poses a stark contrast with decisions of the First and Seventh Circuits. It also represents an even easier burden to establish "willfulness" liability than that presently followed by the Third, Sixth and Ninth Circuits. Considering the heightened prominence the ADEA has acquired in civil rights litigation, there exists a very obvious need for this Court to establish a uniform rule removing the confusion and disarray presently existing among the Circuits, and this case is an excellent vehicle to resolve this important issue.

1983), where Judge Weinfeld of the Southern District of New York notes how the Circuits "differ as to the interpretation of the term." Judge Weinfeld "subscribes to the view that to entitle plaintiff to receive liquidated damages he must establish that the defendant acted with *knowledge of the illegality* of his action." (*Id.* at 1165). Accord *Whittlesey* v. *Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983). Both of these recent cases therefore adopt the *Loeb* and *Syvock* test of the First and Seventh Circuits.

* In almost all ADEA cases in which liability has been found, including the case here, plaintiffs have proceeded under the theory of "disparate treatment" articulated in *Teamsters* v. *United States*, 431 U.S. 324, 335-36 n.15 (1977). The holding of the court below providing recovery of double damages in ADEA cases simply upon a showing of disparate treatment thus has wide application to virtually all ADEA litigants, now and in the future. Because of the vast repercussions of the standard announced below, the issue would be ripe for resolution by this Court even if the Circuits were not so divided.

II

THERE IS AN IMPORTANT QUESTION OF FEDERAL LAW AS TO WHETHER A LABOR UNION FOUND TO HAVE VIOLATED THE ADEA CAN NONETHELESS BE ABSOLVED OF LIABILITY FOR BACK PAY

A. The Holding of the Court Below

In a dramatic about-face, the majority first held ALPA jointly liable with TWA for "back pay, an equitable remedy" (A-34), and then, after denying petitions for rehearing, it issued a terse "Errata Sheet" *deleting* all references to ALPA's liability for monetary relief (A-37 to A-39). In its "corrected" decision, the Second Circuit strikes new ground in holding that "the ADEA . . . does not permit actions to recover monetary damages, including back pay, against a labor organization." (A-38). The Second Circuit thus becomes the first Circuit Court to hold employers *solely* liable for monetary relief under the ADEA even where, as here, the labor organization is found also to have violated the statute.*

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* Only two district courts have squarely addressed the issue, with different results. In *EEOC* v. *ALPA*, 489 F. Supp. 1003, 1009 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981), the court relied on the language of 29 U.S.C. § 626(b) and "analogous case law under Title VII" in reaching its holding that a "union as well as employer can be held liable for backpay awards." A contrary result obtained in *Neuman* v. *Northwest Airlines*, 28 FEP Cases 1488, 1491 (N.D. Ill. 1982).

The majority's "Errata Sheet" added as authority for its holding a citation to *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n.5 (S.D.N.Y 1975). That case, however, dealt not with the ADEA but with the Equal Pay Act, 29 U.S.C. § 206, and simply held that an employer could not maintain a private cause of action against a labor organization for contribution or indemnity.

The *Brennan* holding was subsequently adopted by this Court in *Northwest Airlines, Inc.* v. *TWU*, 451 U.S. 77 (1981), but the question of contribution continues to be inapposite to whether a co-defendant union can be held accountable for back pay liability under the ADEA.

(Footnote continued on following page)

The changed holding below receives no support in the language and purpose of the ADEA to provide employee redress from both labor organizations and employers by giving courts broad power "to grant such legal or equitable relief as may be appropriate" (29 U.S.C. § 626(b)). Unless corrected, the holding below will be inconsistent with "[t]he governing principle" of national labor policy "to apportion liability between the employer and the union according to the damage caused by the fault of each." *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967). Furthermore, without any support in the legislative history, the holding below attributes to Congress an intent to shield unions from monetary liability for the natural consequences of discriminatory acts.

B. The Holding Urged by Petitioner Is Supported by the Clear Purposes of the ADEA

The overriding purposes of the ADEA are "to promote employment of older persons based on their ability rather than age [and] to prohibit arbitrary age discrimination in employment" (29 U.S.C. § 621(b)). To effectuate these purposes, the ADEA contains a number of specific provisions expressly prohibiting age-based conduct by unions.*

See, *e.g.*, *id.* at 88-89 n.20 ("we need not and do not decide the question whether employees have an implied right of action for back pay against their unions for violations of the Equal Pay Act"). As a party certainly possessing a personal stake in the outcome of this issue, TWA is entitled to present it to this Court. See, *e.g.*, *Larson* v. *Valente*, 456 U.S. 228, 238-39 (1982), and cases cited therein.

* For example, Section 4(c) of the ADEA provides that "[i]t shall be unlawful" for a labor organization "to discriminate against . . . any individual because of his age" or "to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (29 U.S.C. § 623(c)). Labor organizations are further prohibited from retaliating against employees or applicants who exercise their ADEA rights (§ 4(d), 29 U.S.C. § 623(d)), and from making age-based distinctions in advertising or referrals for employment. Section 4(e), 29 U.S.C. § 623(e). In addition, labor organizations, like employers, are required to post conspicuously ADEA notices advising individuals of their rights. Section 8, 29 U.S.C. § 627.

The enforcement provision of the ADEA, § 7(b), 29 U.S.C. § 626(b), contains no language absolving labor organizations from monetary liability for this prohibited conduct. Rather, that section broadly provides *that a court* "shall have jurisdiction to grant *such legal* or equitable relief as may be appropriate to effectuate the purposes *of this Act*, including . . . enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation . . ."* Since the purposes of the statute include prohibitions on age-based actions by labor organizations, it is only logical that Congress intended Section 7(b) to include union monetary exposure in appropriate cases. As noted in *EEOC* v. *ALPA*, *supra*, 489 F. Supp at 1009: "It would not effectuate the purposes of the ADEA to allow unions to violate the Act without having to be concerned with being held liable for any resulting monetary damages."**

C. Holding Unions Liable for Back Pay Under the ADEA Would Be Consistent With Other National Labor Laws

Analogous support for holding unions liable can be drawn from case law under Title VII of the Civil Rights Act of 1964,

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* The reference in the statute to "unpaid minimum wages or unpaid overtime compensation" relates to language in the Fair Labor Standards Act ("FLSA") which has been specifically incorporated into Section 7(b) of the ADEA. It was this language which convinced the court in *Neuman*, *supra*, 28 FEP Cases at 1491, that monetary damages from a union were not available under the ADEA. However, such selectivity in the FLSA should not be applied woodenly to bar monetary recovery against a union when Section 7(b) expressly "grant[s] such legal or equitable relief as may be appropriate to effectuate the purposes of *this* Act," not the FLSA.

** See A-31 to A-33 for a discussion of what the majority viewed as the union's culpability here. In the face of such findings, the "Errata Sheet" may have removed monetary liability from ALPA, but it did not alter the majority's holding that "[w]hen a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against the employee renders it independently liable for violation of the ADEA" (A-32).

42 U.S.C. § 2000e *et seq.*, under which unions as well as employers can be held liable for back pay awards.* These two statutes, sharing as they do "important similarities . . . in their aims . . . and in their substantive prohibitions," *Lorillard* v. *Pons*, *supra*, 434 U.S. at 584, "should be interpreted" here "*pari passu*." *Northcross* v. *Memphis Board of Education*, 412 U.S. 427, 428 (1973).

In addition, a firm pronouncement by this Court holding unions liable for monetary relief under the ADEA would be consistent with other important national labor laws. It is well-established, for example, that under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, an employee who proves that the employer violated a labor agreement and that the union breached its duty of fair representation is entitled to recover damages from both the union and the employer "according to the damage caused by the fault of each." *Vaca* v. *Sipes*, *supra*, 386 U.S. at 197.** This is similarly true under the controlling labor relations statute for the airlines, the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), where each party can be held to bear the damages attributable to its fault. See, *e.g.*, *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970) ("judgment against [the union] can . . . be had . . . for those damages that flowed from [its] own conduct"); *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 n.13 (1979) (RLA case reaffirming the apportionment principle in *Vaca*, although a union cannot be liable for punitive damages).

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* See, *e.g.*, *Sears* v. *Atchison, Topeka & S.F. Ry.*, 645 F.2d 1365, 1374-77 (10th Cir. 1981), *cert. denied sub nom. UTU* v. *Sears*, 455 U.S. 964 (1982); *Donnell* v. *General Motors Corp.*, 576 F.2d 1292, 1300 (8th Cir. 1978), *cert. denied*, __ U.S. __, 103 S. Ct. 97 (1982); *Russell* v. *American Tobacco Co.*, 528 F.2d 357, 366 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

** This principle was reaffirmed just last term in *Bowen* v. *United States Postal Service*, __ U.S. __, 103 S. Ct. 588 (1983), which held that where a union refuses to go to arbitration and is found to have breached its duty of fair representation, the union is liable for back pay damages that accrue after a hypothetical date on which an arbitrator would have issued an award.

Given the substantial role that unions play in many activities subject to challenge under the ADEA, no reason exists why the *Vaca* principle of apportionment should not obtain under the ADEA. Apart from the circumstances here, myriad situations exist wherein employers and unions are being jointly challenged under the ADEA. This is particularly true where the dispute centers on provisions in a collective bargaining agreement (by definition a joint employer/union endeavor). Without the spectre of monetary exposure, the "interest in deterring future [unlawful acts] by the union," *Bowen*, *supra*, 103 S. Ct. at 597 n.16, is meaningless.

III

THIS COURT SHOULD DECIDE WHETHER THE ADEA REQUIRES AN EMPLOYER TO ACCOMMODATE EMPLOYEES FOR AN AGE-RELATED REASON MERELY BECAUSE IT PROVIDES ACCOMMODATION FOR NON-AGE-RELATED REASONS

The Majority's Holding Presents Not Only an Important Question of Federal Law But Also One on Which the Courts of Appeals Have Rendered Conflicting Decisions

The majority's basis for liability against TWA is predicated upon a fundamental fallacy as to what the ADEA requires. This new ADEA standard is contrary to clear Congressional intent and in conflict with at least two other Circuit Courts of Appeals. If allowed to prevail, its ramifications for all employers are enormous.*

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* Even if the decision did not affect all employers, it obviously affects the entire commercial airline industry.

At the present time, American Airlines has won at trial on its position that former Captains should not serve at all in the cockpit past age 60 as Flight Engineers. See *Johnson* v. *American Airlines, Inc.*, 18 Av. Cas. 17,177 (N.D. Tex. 1983), *appeal pending*, No. 83-1610 (5th Cir.). On the other hand, two airlines (Western and United Air Lines)

(Footnote continued on following page)

The majority holds that "because TWA routinely accommodates other employees . . . for *non-age* reasons," it must "accord the *same* treatment to age-60 captains and first officers . . ." (A-31). The majority is therefore apparently saying that every time an employer accommodates an employee for a non-age-related reason, it may now have to provide the same accommodation to someone claiming such entitlement simply because of age.

This is, as the dissent notes, "like comparing apples with oranges." (A-35 to A-36). Moreover, its impact on an employer's handling of its work force cannot be overemphasized. Does this mean that an employer providing a month's vacation to every employee of five year's service should now provide a month's vacation for all employees covered by the ADEA even if they do not have five years' service? Similarly, the dissent refers to a TWA Captain who breaks his leg (A-36). Does this mean that if a TWA Captain breaks his leg at age 50 (entitling him up to almost a year's sick pay at Captain rates while he recovers) (J.A. 288, 289; Secs. 15(A), (G)), then TWA should pay the same year's sick pay to a Captain who breaks his leg one day prior to age 60 even though the FAA regulation bars him from serving as a Captain past age 60?

The list is obviously endless. Now every time employers do something for a non-age reason, they must look over their shoulders to be certain they are not creating a situation where

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have lost at trial on their position that no one should be allowed to serve in the cockpit beyond age 60. See *Criswell* v. *Western Air Lines, Inc.*, 514 F. Supp. 384 (C.D. Cal. 1981), *aff'd*, 709 F.2d 544 (9th Cir. 1983), *petition for rehearing pending*; *Monroe* v. *United Air Lines, Inc.*, 32 FEP Cases 1256, 1258-59 (N.D. Ill. 1982), *appeal pending*, Nos. 83-1245 *et al.* (7th Cir.). A third position has now been adopted by the majority below when it found liability for a group of age 60 pilots who had been unable or unwilling to transfer to Flight Engineer even though it is undisputed that 83% of those wishing to fly past age 60 were doing so (A-61 n.8). The confusion is obvious, and this Court should examine the industry-wide issue of whether, and under what circumstances, an airline must permit Flight Engineers to serve beyond age 60.

employees will come back and say they are entitled to the same thing because of age. The plaintiffs here were as much entitled as anyone else to the non-age accommodations to which the majority refers (A-10 to A-11). However, the mere existence of such non-age policies should not mean that just because of age the plaintiffs mandatorily acquire a *new* right.

Indeed, as noted by Judge Van Graafeiland in his dissent (A-36), the special creation of an age-related right is clearly contrary to Congressional intent. The House of Representatives Report accompanying the 1978 amendments specifically says that the ADEA amendments do "*not require* employers to provide *special working conditions* for older workers to allow them to remain or become employed." H.R. Rep. No. 95-527, 95th Cong., 1st Sess. 12 (1977).

Moreover, the holding below conflicts with decisions by both the Fifth and Eighth Circuits, the only other two Circuits which have commented on the question.* Recognizing the clear Congressional intent to treat everyone equally, the Fifth Circuit has specifically held that the age of an employee should be "accorded neutral status under the ADEA, neither facilitating nor hindering his employment, his chances for advancement, or his exposure to demotion or discharge." *Williams* v. *General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982). The Eighth Circuit followed the same standard when it held in *Cova* v. *Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978), that the ADEA "does not require that advanced age and substantial length of service

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* While the majority below believes otherwise (A-29), the holding is also in conflict with the Second Circuit's own decision in *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, ____ U.S. ____, 103 S. Ct. 725 (1983), which held that the "ADEA does not require an employer to accord special treatment to employees over forty years of age . . . It requires, instead, that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski* was written by Judge Van Graafeiland, who dissented here on the grounds that the majority was "comparing apples with oranges." (A-35 to A-36).

entitle employees to special favorable consideration; it requires merely that an employee within the protected age group not be the subject of discrimination because of his or her age."

By having Captains bid for Flight Engineer in just the same manner as flight deck positions are normally filled under the collective bargaining agreement, TWA treated everyone *equally*—consistent with Congressional intent and with the prior holdings of the two other Circuits which have commented on the issue. It is undisputed that under TWA's policy, at least 83% of those Captains seeking to serve beyond age 60 have succeeded in that regard pursuant to the terms of a neutral bona fide seniority system (A-61 n.8).* Yet that is not good enough for the plaintiffs and the majority below. What plaintiffs have been given by the majority is a virtual *guarantee* of a new position based on age simply because, in different circumstances, similar positions were provided to others for reasons unrelated to age. Indeed, the EEOC openly states that its claimants are entitled to "*affirmative action* programs" whereby they are "*automatically* placed in a Flight Engineer position" (J.A. 841-42).**

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* When the plaintiffs were unable or unwilling to change their Captain status in accordance with the normal bidding procedures of the neutral seniority system, they were mandatorily retired at age 60 because they were in a position admittedly subject to the BFOQ exception to the ADEA (A-7 to A-8). Indeed, no one disputes that they could not serve *as Captains* beyond age 60. The district court properly held, therefore, that the plantiffs "cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." (A-57).

** The majority below persists in claiming that what they are providing to the plaintiffs is "merely . . . the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age reasons." (A-29 to A-30). But their reasoning inevitably creates a *new* right based on age. The plaintiffs not only get the same accommodations for non-age reasons as everyone else, but they now enjoy under the majority's decision these accommodations based on age.

In view of the ramifications of this decision for all employers, this Court should grant this petition to determine whether the majority of the panel has exceeded the intent of Congress by its ruling. A grant of the petition is equally appropriate because the majority's decision is contrary to what the Fifth and Eighth Circuits have said with respect to the ADEA not requiring special treatment for individuals covered by the statute.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the opinion and judgment of the Second Circuit.

Respectfully submitted,

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December 16, 1983

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1013, 1014, 1166—August Term, 1982

Argued: April 14, 1983 Decided: August 1, 1983

Docket Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Plaintiff-Appellant,

—against—

TRANS WORLD AIRLINES, INC.,

Defendant-Appellee,

HAROLD H. THURSTON, et al. and
NICHOLAS VASILAROS, et al.,

Defendants-Intervenors Appellees.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C. A. PARKHILL,

Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor Appellant,

—against—

TRANS WORLD AIRLINES, INC. and AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Defendants-Appellees.

Before:

WATERMAN, MANSFIELD and VAN GRAAFEILAND,
Circuit Judges.

Judge Van Graafeiland concurs and dissents in a separate opinion.

Consolidated appeals from judgments of the Southern District of New York, Kevin T. Duffy, Judge, in two lawsuits growing out of TWA's action in response to Congress' 1978 amendment of the Age Discrimination in Employment Act, 29 U.S.C. §§621-634 (1976 and Supp. V 1981) ("ADEA"). TWA permits flight engineers to work until age 70 instead of being required to retire at 60 and allows captains and first officers, who must retire as such at 60 years, to downbid their status to that of flight engineer on certain conditions.

The district court granted TWA's motions for summary judgment dismissing (1) an action against it by the bargaining representative for flight deck crew members, Air Line Pilots Association ("ALPA"), claiming that age under 60 is a bona fide occupational qualification for flight engineer status and therefore exempt from the 1978 amendment, and (2) an action by certain captains and first officers (*Thurston*, et al.) claiming that TWA discriminated against them in violation of ADEA by re-

fusing to permit them to downbid to the position of flight engineer after they reached 60 years of age.

The judgment in the action by ALPA is affirmed.

The judgment in the *Thurston* action is reversed with directions to enter summary judgment in favor of the plaintiffs.

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MANSFIELD, *Circuit Judge*:

These consolidated appeals from judgments in two separate lawsuits against Trans World Airlines, Inc. ("TWA") in the Southern District of New York, Kevin T. Duffy, Judge, grow out of actions taken by TWA on August 10, 1978, permitting flight deck crew members in the status of "flight engineer" to work until the age of 70 instead of requiring them, as had been TWA's policy with respect to all such crew members (including captains and first officers), to retire at age 60. TWA made the change in response to Congress' amendment on April 6, 1978, of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634 (1976 and Supp. V 1981) to prohibit mandatory retirement prior to age 70.

In one action the Air Line Pilots Association ("ALPA"), bargaining representative of the flight deck crew members, challenged TWA's policy, seeking a declaratory judgment that age under 60 is a bona fide occupational qualification ("BFOQ") for flight engineers within the meaning of §623(f)(1) of the ADEA[1] and that

1 Title 29 U.S.C. §623(f)(1) provides in pertinent part:

"It shall not be unlawful for an employer . . . (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ."

TWA's action represented a unilateral change in working conditions in violation of the Railway Labor Act ("RLA"), 45 U.S.C. §156-188 (1976 & Supp. V 1981).[2] ALPA appeals from a summary judgment in favor of TWA. In a second action (*Thurston, et al. v. TWA and ALPA*) a group of crew members (captains and first officers) formerly employed by TWA, who had been unsuccessful in securing flight engineer status before their 60th birthdays, claim that TWA's policy, instigated and encouraged by ALPA, discriminates against them in violation of the ADEA by refusing to permit them to downbid to the position of flight engineer after they reached 60 years.[3] The crew member-plaintiffs appeal from a summary judgment dismissing their action.[4] We affirm the dismissal of ALPA's action and reverse the dismissal of the *Thurston* action.

The material facts are not in dispute.[5] TWA, a commercial aircraft carrier, employs approximately 3,000 "pi-

2 A group of former TWA captains, including Harold Thurston, a private plaintiff in the second action against TWA, and a group of permanent flight engineers (Vasilaros, et al.), were granted intervenor status to support TWA's policy.

3 The Equal Employment Opportunity Commission ("EEOC") was granted intervenor status as a plaintiff in this action, on behalf of other involuntarily retired captains and crew members who were or would be adversely affected by TWA's requirement that captains and first officers assume flight engineer status before their 60th birthday or be mandatorily retired.

4 The court's decision of September 13, 1982, 547 F. Supp. 1221, incorporated the reasoning of its prior decisions entered on November 17, 1980, 506 F. Supp. 234, and on January 26, 1981, 506 F. Supp. 236.

5 The parties did not enter into a stipulation of undisputed facts in the summary judgment proceedings below, but in their briefs and at oral argument the parties agreed that the case was in an appropriate posture for summary judgment as to liability.

lots"[6] on its wide-bodied planes in three (and sometimes four) cockpit positions. The "captain" commands the aircraft and is responsible for all phases of its operation. The "first officer" assists or relieves the captain as co-pilot. The "flight engineer" sits at a side-facing instrument panel and is primarily responsible for pre-flight inspection and in-flight monitoring of the mechanical, electrical, and electronic functioning of the aircraft.

A flight engineer does not operate the flight controls. Unlike the captain and first officer, who are required by the Federal Aviation Administration ("FAA") to have first class medical certification, the flight engineer needs only a second class medical certificate. The flight engineer does have crucial duties in emergencies, such as an all-engine flame-out but, should the flight engineer become incapacitated, the "fail-safe" principle of crew redundancy means that the first officer would perform the engineer's duties until the aircraft is brought to an emergency landing. In the event of incapacitation of the captain or first officer, the flight engineer may perform first officer duties except for take-off and landing. On certain long-distance flights there is a fourth crew member, an "International Relief Officer" ("IRO"), who acts as third in command and who performs, *inter alia*, first officer duties (excluding take-off and landing) and flight engineer duties.

6 Although most people probably think of the term "pilot" as limited to officers who handle the flight controls of a plane, the Working Agreement between ALPA and TWA defines all TWA flight deck crew members, including flight engineers, as "pilots" and requires that all TWA "pilots" possess a currently effective commercial pilot's certificate and other pilot qualifications. The FAA does not require flight engineers to possess pilot qualification. Certain "career" flight engineers, such as the defendant-intervenor-appellee in *ALPA v. TWA*, Nicholas Vasilaros, who were on the seniority list in 1962, are permitted by agreement to continue as flight engineers without pilot certification.

Under an FAA regulation, 14 C.F.R. §121.383(c) (1982), persons are prohibited from serving as "pilots" on a commercial aircraft carrier beyond age 60 ("Age 60 Rule"). Captains, first officers, and IRO's are considered "pilots" for purposes of the Age 60 Rule. The Age 60 Rule, however, does not apply to the third seat position of flight engineer.

The ADEA as amended prohibits an employer from discriminating against an employee between the ages of 40 and 70 "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . ." and from limiting, segregating, or classifying its employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. §§623(a)(1), (a)(2). The Act further forbids the involuntary retirement of an employee within the protected age group "because of the age of such individual." *Id.* §623(f)(2). It is also unlawful under the ADEA for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of [the Act] . . . ." *Id.* §623(c)(3).

The ADEA, however, permits an employer or labor organization to take actions otherwise prohibited under the Act "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age," *id.* §623(f)(1), or "to observe the terms of a bona fide seniority system . . . which is not a subterfuge to evade the purposes of [the Act] . . . ." *Id.* §623(f)(2).

The parties agree for purposes of this litigation that the FAA Age 60 Rule may establish a "bona fide occupa-

tional qualification" ("BFOQ") for captains and first officers within the meaning of 29 U.S.C. §623(f)(1) of the ADEA. Cf. e.g., *Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978); *Rombough v. FAA*, 594 F.2d 893, 899 (2d Cir. 1979) (upholding FAA's denial of exemption from Age 60 Rule as within agency's discretion); but cf. *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 846 (6th Cir. 1982).[7]

The "Retirement Plan for Pilots of Trans World Airlines, Inc.," ("Retirement Plan") negotiated as part of the 1977 Working Agreement between TWA and ALPA and incorporated in it by reference, provided that the "normal retirement date is the [pilot's][8] 60th birthday" and that "[pilots] must retire by their normal retirement date unless written approval of the company is granted for continuance in employment." Articles 4.1, 4.2. Article 4.3 of the agreement provides for the disbursement of retirement benefits in the event of employment past age 60. The agreement was re-negotiated in 1979 (with a non-re-negotiation provision stating that the agreement could not be reopened until September 30, 1981) and again in April 1982. The retirement provisions remained unchanged. They had governed the relationship for many years prior to these agreements, and, historically, TWA had employed no flight crew member over the age of 60 on its airplanes until 1978.

Following Congress' April 6, 1978, amendment of the ADEA to prohibit, *inter alia*, the involuntary retirement of persons before the age of 70 solely on the basis of age even if in accordance with a bona fide seniority plan, 29

7 ALPA originally opposed the FAA's Age 60 Rule as arbitrary and discriminatory. See *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892 (2d Cir. 1960).

8 See note 6, *supra*.

U.S.C. §623(f)(2), TWA failed to agree with ALPA on a revision of TWA's retirement program so that it would comply with the 1978 amendments. On August 10, 1978, TWA unilaterally issued a bulletin authorizing the continued or reactivated employment of "any cockpit crew member who is in a flight engineer status at age 60," retroactive to April 6, 1978. The term "flight engineer status" was not defined and the procedure whereby captains and first officers approaching 60 might acquire that status was not described. The bulletin simply provided that those flight deck officers who wanted to work past 60 would "be governed by the provisions of the current Working Agreement" and the FAA's Age 60 Rule for captains and first officers.

To implement its new policy TWA immediately reinstated those who had been in flight engineer status on their 60th birthdays and had been retired after April 6, 1978. Flight engineers reaching their 60th birthday after August 10, 1978 continued in that status. However, captains and first officers who might seek to downbid themselves to the position of flight engineer and then work as such beyond age 60 were required to change their status to flight engineer in accordance with the seniority and bidding procedures of the Working Agreement.

Under those procedures a captain or first officer approaching 60 years of age was required successfully to complete his downbid with an effective date as a flight engineer before he reached 60 years or else face mandatory retirement and removal of his name from the seniority list upon his reaching 60 years. Since the downbidding captain or first officer first had to pass the FAA written examination for flight engineer and then wait until a flight engineer vacancy opened up before his bid would

become effective,[9] the procedure forced captains and first officers desiring to continue as flight engineers after 60 to downbid well before they reached 60 or lose out altogether.

Most of the 70 captains and first officers who have downbid for flight engineer positions successfully obtained that status before reaching 60. However, several, including plaintiff-appellant Harold Thurston, turned 60 between April 6 and September 1, 1978, when there were no flight engineer vacancies. Hence they could not secure a flight engineer bid before their 60th birthdays. Accordingly, they were mandatorily retired and their names were removed from the seniority list.[10]

Under TWA's 1977 Working Agreement with ALPA, captains or first officers who downbid to the position of flight engineer for reasons other than age were not similarly stripped of their seniority or severed from TWA. For example, those who are unable to maintain a first class medical certificate but are still medically qualified to become flight engineers may automatically displace or "bump" a less senior flight engineer without being required to bid for the downgraded position. If the captain or first officer lacks sufficient seniority to displace, he is not discharged; rather, he is entitled to go on unpaid medical leave for up to five years.

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9 Since 1980 TWA further requires that "whenever possible" downbidding captains be trained as flight engineers prior to the effective date of their flight engineer bids.

10 In addition to Harold Thurston, there were in the court below two other named plaintiffs, Clifton A. Parkhill and Christopher J. Clark, and 10 EEOC claimants. Three of the EEOC claimants have since settled. The remaining EEOC claimants are: A.M. Lusk, L.D. Bobzin, Robert Gowling, T.H. Widmayer, Alfred T. Humbles, Donald V. Roquemore, and Horace W. Lewis.

Similarly, the Working Agreement provides that a pilot whose position is eliminated at a domicile due to reductions in force may use his seniority to displace a less senior pilot in any status at his current or last former domicile, or in his current status anywhere in TWA's system. Like his medically disabled counterpart, the jobless pilot who lacks sufficient seniority to displace is not discharged. Rather, he is placed on furlough status which may extend for up to 10 years during which time he continues to accrue seniority for purposes of a recall.

In addition, TWA, as a disciplinary measure in response to demonstrated incompetence, has not discharged incompetent pilots but has permanently transferred them to lower positions (such as that of flight engineer) for which they are qualified, without requiring the pilot to bid for a vacancy. This practice apparently routinely occurs without contractual provision.

Following TWA's August 10, 1978, bulletin, ALPA prevailed upon TWA to impose additional restrictions on downbidding captains and first officers approaching age 60, which were designed to make it more difficult for downbidders approaching 60 to acquire status as flight engineers. The first restriction put forth by ALPA and adopted by TWA in January 1980 requires successful captain downbidders to "fulfill their bids in a timely manner." Prior to this rule downbidding captains who had successfully bid for positions as flight engineers were permitted to function as captains until age 60 and then begin training as flight engineers. Under the new rule the downbidding captains are required to complete their training and assume their positions as flight engineers before reaching 60, thereby losing the difference in pay and responsibility they would have enjoyed if they had been allowed to complete their careers as captains up to

60 years of age. This rule resulted in the cancellation of bids awarded three downbidding EEOC plaintiffs and in their involuntary retirement.

The second restriction, also imposed in January 1980, relates to the time by which the downbidder must complete his written examination for the position of flight engineer. Previously the downbidder was placed at age 60 on an off-duty-without-pay status until he had passed the examination. Under the new rule the captain's downbid is cancelled unless he has passed the examination when reporting for training. This rule, operating with the "effective date" requirement, forced the retirement of two EEOC plaintiffs.

The district court ruled that TWA's elimination of its age 60 retirement policy for flight engineers was not a "major" dispute under the RLA and that age 60 for flight engineers was not a BFOQ within the meaning of the ADEA precluding TWA from continuing those over 60 in that status. The court accordingly awarded summary judgment to TWA in the *ALPA* action. 547 F. Supp. at 1226-28; 506 F. Supp. at 238; 506 F. Supp. at 234-36.

With respect to the *Thurston, et al.* and *EEOC* claim the district court determined that TWA was also entitled to summary judgment, concluding that since none of the *Thurston* plaintiffs or EEOC claimants could show that a flight engineer vacancy existed at the time he applied and was eligible for the job "TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. . . . TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system." 547 F. Supp. at 1229.

DISCUSSION

The parties agree that on these appeals there are no material issues of fact relating to liability and that the disputed liability issues may appropriately be disposed of by summary judgment. See *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1136 (9th Cir.), *cert. denied*, 423 U.S. 1025 (1975); *Fitzgerald v. Westland Marine Corp.*, 369 F.2d 499, 500 (2d Cir. 1966).

A. *ALPA v. TWA*

1. *The "Major-Minor" Dispute Issue*

The first issue raised by ALPA is whether TWA's unilateral elimination of the mandatory age 60 retirement for flight engineers constitutes a "major" change in existing terms and conditions of employment in violation of the union's bargaining rights under §6 of the Railway Labor Act, 45 U.S.C. §156, which would be remediable by a federal court, or whether the change involves a "minor" dispute arising out of the application and interpretation of the existing agreement, which would be subject to binding adjudication by the appropriate Adjustment Board.

To resolve the "major"-"minor" dispute controversy we look first

> "to the collective bargaining agreement to determine whether a plausible interpretation would justify the carrier's action. A dispute is major if the carrier's contractual justification for its actions is 'obviously insubstantial.' On the other hand, a dispute is minor if the contract is 'reasonably susceptible' to the carrier's interpretation." *Local 553, Transport*

Workers Union v. Eastern Air Lines, Inc., 695 F.2d 668, 673 (2d Cir. 1982) (citations omitted).

When it is difficult to determine whether the agreement between the parties "arguably supports" the carrier's actions, we look, in close cases, at the pragmatic effects of the carrier's action on working conditions to see whether the magnitude of the disruption caused by the carrier is "major" in a literal sense. *Id.* at 674. But when there is a "clearly governing provision in the present agreements," our inquiry need not range beyond the interpretation of the language of the agreement. *Rutland Railway Corp. v. Brotherhood of Locomotive Engineers*, 307 F.2d 21, 34 (2d Cir. 1962), *cert. denied*, 372 U.S. 954 (1963).

Applying these standards, TWA's post-1978 retirement policy clearly does not give rise to a major dispute; at most there exists a minor dispute over the carrier's interpretation or application of the parties' 1977 Working Agreement. That agreement expressly allowed TWA to retain employees after age 60 by written waiver of the age limit, Retirement Plan, Article 4.2, and provided in Article 4.3 for the disbursement of retirement benefits in the event of employment past age 60. In view of this "clearly governing provision" in the agreement, *Rutland Railway, supra*, TWA's justification for its action is not "obviously insubstantial." *Local 553, supra*, 695 F.2d at 673. See also *Cafferty v. Trans World Airlines, Inc.*, 488 F. Supp. 1076, 1078 & n.3 (W.D. Mo. 1980) (stating with respect to the same Working Agreement that "the [waiver] provision [arguably] constitutes a standing consent by ALPA to the action taken by TWA in 1978").

ALPA argues that despite the provisions of the Agreement, no TWA flight engineer ever served past age 60 in

the period between the adoption of the initial retirement plan in 1950 and the August 1978 change in policy. This longstanding practice, ALPA submits, established a clear understanding between the parties that the agreement required retirement at age 60. See *Brotherhood of Locomotive Firemen and Enginemen v. Southern Railway Co.*, 217 F. Supp. 58, 62 (D.D.C. 1963), *aff'd*, 337 F.2d 127 (D.C. Cir. 1964). We disagree.

Whatever the significance of TWA's practice of not invoking its discretionary power under the Agreement to waive the age 60 retirement policy, ALPA may not now seek to compel negotiations over that policy when, as Judge Duffy found, "(i) it had ample opportunity to do so when the 1979 Working Agreement was negotiated; and (ii) when the 1979 Working Agreement states that the entire Agreement shall remain in full force and effect through September 30, 1981 and may not be reopened under Section 6 of the RLA any sooner than 120 days prior to September 30, 1981 unless the parties mutually agree otherwise." 506 F. Supp. at 238. We have deemed such non-renegotiation provisions an essential "instrument for achieving industrial peace," *Seaboard World Airlines, Inc. v. TWU*, 443 F.2d 437, 439 (2d Cir. 1971), and we will not turn them aside when the parties to the signing of the agreement were fully aware of the contested issue. Cf. *Flight Engineers' International Association v. American Airlines, Inc.*, 303 F.2d 5, 13 (5th Cir. 1962). Furthermore, since Judge Duffy's 1981 decision, ALPA signed another Working Agreement with TWA in April 1982 and again failed to negotiate over TWA's retirement policy for flight engineers. 547 F. Supp. at 1224 n.2. If nothing else, ALPA has now waived any right it might have had to compel negotiation on a subject over which it decided not to negotiate on two occasions. Accordingly,

we affirm the district court's grant of summary judgment in favor of TWA dismissing ALPA's claim that the elimination of the age 60 retirement policy for flight engineers constitutes a "major" dispute.

2. *The "Bona Fide Occupational Qualification" ("BFOQ") Issue*

ALPA next seeks a declaratory judgment that the 1978 amendments to the ADEA did not require retention of flight engineers past age 60 because that age is a "bona fide occupational qualification" for flight engineers within the meaning of 29 U.S.C. §623(f)(1). At the outset we are met with a challenge to the district court's jurisdiction to adjudicate the merits of ALPA's claim, for it is unquestioned that the Declaratory Judgment Act, 28 U.S.C. §§2201-02, which provides that in "a case of actual controvery within its jurisdiction," a federal court "may declare the rights and other legal relations of any interested party," does not itself create any federal jurisdiction. The Declaratory Judgment Act provides an additional remedy in cases resting on some independent basis of federal jurisdiction. *Miller-Wohl Co. v. Commissioner of Labor and Industry, State of Montana*, 685 F.2d 1088, 1090 (9th Cir. 1982).

ALPA's pleadings assert jurisdiction under 28 U.S.C. §§1331 and 1336 and base its claim to federal question jurisdiction alternatively on two federal statutes: the RLA or the ADEA. Our determination that TWA's unilateral change in its retirement policy appears to be permitted by the Working Agreement, thereby constituting at most a minor dispute, necessarily disposes of the claim to jurisdiction under the RLA. A minor dispute is subject to binding adjudication by the appropriate Adjustment Board, which has exclusive jurisdiction to resolve ques-

tions of contract interpretation. "[C]ourts may not adjudicate the merits of these [minor] issues." *Local 553*, *supra*, 695 F.2d at 674-75; 45 U.S.C. §153, First. Consequently, we will not enjoin a carrier from actions that have given rise to a minor dispute when the RLA "calls for the Adjustment Board to determine whether the carrier's action was permissible under the governing contract." *Id.* (citing *United Transportation Union v. Penn Central Transportation Co.*, 505 F.2d 542, 545 (3d Cir. 1974) (per curiam)).

Our intervention in the merits of this minor dispute would defeat the Adjustment Board's jurisdiction, a result directly contrary to the dispute resolution mechanism of the RLA. Although courts may take action to preserve a minor dispute for the Adjustment Board when the carrier's actions threaten irreparable injury to the union which would render a subsequent decision by the Board in the union's favor " 'an empty victory,' " *Local 553*, *supra*, 695 F.2d at 675 (quoting *Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*, 363 U.S. 528, 534 (1960)), the evidence is overwhelming that an Age 60 Rule for flight engineers is not reasonably necessary to insure safety standards and that ALPA's claim to the contrary must be rejected.[11] As of February

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11 Although ALPA argues that this dispute threatens the safety of its members, it admits that its action is motivated by economic, not just safety, concerns: "The continuation in employment of flight engineers over age 60 has necessarily deprived substantial numbers of furloughed pilots of work opportunities. Between August, 1979 and June, 1980 TWA laid-off approximately 375 pilots. . . . As of February, 1982, TWA employed approximately 130 flight engineers over age 60. . . . All incumbent flight engineers with lesser seniority than this group have suffered a loss of the opportunity to obtain higher paying flight engineer assignments, and to obtain assignments with preferred working conditions." Brief for Plaintiff-Appellant ALPA pp. 10-11. Economic considerations, however, cannot be the basis for a BFOQ, when "precisely those considerations were among the targets of the

1982, TWA employed approximately 130 flight engineers over age 60. ALPA has pointed to no evidence indicating that any airline accident has ever been caused by the incapacitation of a flight engineer, much less an over-60 flight engineer. The first officer, and sometimes an additional International Relief Officer, is always there to take over the flight controls should the captain become incapacitated.

The FAA, the paramount agency charged with airline safety, has not imposed its Age 60 Rule on flight engineers. Indeed, the agency has announced an intention to reconsider its Age 60 Rule for captains and first officers, and, as one district court has noted, the FAA does not even apply its Age 60 Rule to its own pilots who fly the agency's fleet, which includes aircraft as large as Boeing 707s. *Criswell v. Western Air Lines, Inc.*, 514 F. Supp. 384, 390 n.9 (C.D. Cal. 1981), *aff'd*, ____ F.2d ____ (9th Cir. June 28, 1983). Nor has TWA, which operates under a congressional mandate to maintain "the highest possible degree of safety," 49 U.S.C. §1421(b), perceived any danger in employing flight engineers over age 60.

Furthermore, courts that have considered this issue have uniformly agreed that Age 60 for flight engineers is not reasonably necessary to airline safety. See, e.g., *Criswell v. Western Air Lines, Inc.*, *supra*, 514 F. Supp. at 389-90, *aff'd*, ____ F.2d ____ (9th Cir. June 28, 1983); *Monroe v. United Air Lines, Inc.*, 31 E.P.D. ¶ 33,330 (N.D. Ill. 1983). That ALPA was a third-party defendant in the *Monroe* action, with a full and fair opportunity to litigate the BFOQ issue, might by itself provide grounds for dismissal of this meritless claim on well-established principles of collateral estoppel. See, e.g., *Montana v.*

Act." *Smallwood v. United Air Lines, Inc.*, 661 F.2d 303, 307 (4th Cir. 1981), *cert. denied*, 456 U.S. 1007 (1982).

United States, 440 U.S. 147, 153 (1979); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). In the absence of any showing that Age 60 is a BFOQ and thus that TWA's action threatens the union with irreparable injury, we hold that jurisdiction is lacking under the RLA to adjudicate the merits of ALPA's BFOQ claim.

The union argues in the alternative that we have jurisdiction to entertain the issue under the ADEA. ALPA reasons that because the ADEA makes it unlawful for a labor organization "to cause or attempt to cause an employer to discriminate against an individual in violation of this section," 29 U.S.C. §623(c)(3), and because the ADEA contemplates the routine assertion by unions of the defense that employment practices are not unlawful by reason of a BFOQ, §623(f)(1), even in circumstances where the employer has refused to comply with union requests to implement the qualification policy, the Act must also permit the *creation* of a BFOQ defense that may be adjudicated affirmatively by means of an action for a declaratory judgment. We disagree.

Even if a labor organization could assert a BFOQ defense in opposition to the employer's position (a dubious proposition for it is the employer, not the union, who sets occupational qualifications), the ADEA does not provide employers or labor unions with a cause of action to preempt the rights of employees by filing an anticipatory declaratory judgment action to establish a statutory defense. The ADEA protects the rights of "persons[s] aggreived"—individual employees and applicants for employment—between 40 and 70 years of age. 29 U.S.C. §§623(a)-(e), 626(c)(1), 631. A union may have standing under the ADEA to vindicate the rights of its members that the ADEA is designed to protect. See *Warth v. Seldin*, 422 U.S. 490, 500 & n.12, 511 (1975); cf. *Interna-*

tional Woodworkers of America v. Georgia-Pacific, 568 F.2d 64, 66-67 (8th Cir. 1977) (union has associational standing to file suit under Title VII to end discrimination); *EEOC v. Emerson Electric Co.*, 539 F. Supp. 153, 155 (E.D. Mo. 1982) (same). Here, however, ALPA is not suing "to promote employment of older persons," which is the purpose of the Act, 29 U.S.C. §621(b). On the contrary, it seeks to use the ADEA to cut off the rights of the older flight engineers. This ALPA may not do. The basic objective of the ADEA is to outlaw unjustifiable discrimination based on age. It follows that no cause of action to force an employer to discriminate through the establishment of an age-related BFOQ can "arise under" the ADEA. Cf. *Chrysler Corp. v. Brown*, 441 U.S. 281, 290-94 (1979) (Chrysler cannot sue under FOIA, a disclosure statute, to force *non*disclosure); *Von Aulock v. Smith*, 548 F. Supp. 196, 197 (D.D.C. 1982) (employees lack standing to seek declaration that employer's affirmative defense under the ADEA may be invalid); *Wohl Shoe Company v. Wirtz*, 246 F. Supp. 821, 822 (E.D. Mo. 1965); see also *St. Louis, Missouri, Paper Carriers Union No. 450 v. Pulitzer Publishing Co.*, 309 F.2d 716, 718 (8th Cir. 1962).

Aside from the fact that the purpose of the ADEA would be frustrated by ALPA's declaratory action, the action would also by-pass the statutory procedure provided for by the ADEA, which is based on the prior filing of a charge of unlawful discrimination with the EEOC beginning a process of "conciliation, conference, and persuasion." 29 U.S.C. §626(d).[12] See also 29 U.S.C.

12 Timely filing of a charge with the EEOC is a jurisdictional prerequisite to the maintenance of a Title VII action. *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 555 n.4 (1977); *De Figueiredo v. TWA*, 527 F. Supp. 933, 934-35 (S.D.N.Y. 1981).

§633(b). A potential ADEA defendant cannot be permitted to invoke the declaratory judgment procedure "to pre-empt and prejudge issues that are committed for initial decision to an administrative body." *Utah PSC v. Wycoff Company, Inc.*, 344 U.S. 237, 241, 246 (1952); cf. *Katzenbach v. McClung*, 379 U.S. 284, 296 (1964).

The BFOQ is an extremely narrow exception to the general prohibition against age discrimination. *Orzel v. City of Wauwatosa Fire Dep't*, 697 F.2d 743, 748 (7th Cir. 1983); 29 C.F.R. §860.102(b) (1982); cf. *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977) (sex based discrimination). The defense must relate to the actual ability of the employee to perform his or her assigned job. *Smallwood v. United Air Lines Inc.*, 661 F.2d 303, 307 (4th Cir. 1981); *cert. denied*, 456 U.S. 1007 (1982); *Gathercole v. Global Associates*, 545 F. Supp. 1280, 1282 (N.D. Cal. 1982). The BFOQ, therefore, cannot be established without proof relating to the inability of medical science to "predict, on an individual basis, the likelihood that a pilot who has reached age 60 will become incapacitated during flight." *Tuohy v. Ford Motor Co.*, 675 F.2d 842, 846 (6th Cir. 1982). We will not strain to expand our discretionary jurisdiction to issue a declaratory judgment in aid of this narrow BFOQ defense, particularly absent any showing of legitimate safety concerns.

In sum, the purpose and structure of the ADEA do not permit us to provide an avenue for implementing ALPA's attempt to use the Act to cut off the rights of its older members. Accordingly, we hold that we lack jurisdiction under either the RLA or the ADEA to entertain ALPA's declaratory judgment action. Dismissal of it must therefore be affirmed.

B. *THURSTON AND EEOC v. TWA AND ALPA*

Those appellants who were prevented by the Age 60 Rule from downbidding from captain to flight engineer contend that the district court erred by adhering woodenly to the formula prescribed by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), for establishing a prima facie case of discriminatory treatment and by failing to consider their direct evidence of an age-based differentiation in the treatment of downbidding captains and first officers. Appellants also argue that the district court erred in holding that they could not establish a violation of the ADEA under a disparate impact theory. Finally, they maintain that the court further erred in holding that TWA's actions fell within the exceptions provided by 29 U.S.C. §623(f) of the Act. Consideration of these claims requires a brief discussion of the governing legal principles of discrimination law.

A plaintiff has the initial burden of offering adequate evidence to raise an inference that an employment decision was based on discriminatory criteria illegal under the Act. Once this burden is discharged the plaintiff has made out a prima facie case. Then the defendant must come forward and articulate some legitimate, nondiscriminatory reason for the employer's actions. The plaintiff thereafter must, in order to prevail, prove that the defendant's proffered reason is merely a pretext for discrimination. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 25[illegible]1); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 (1977); *Pena v. Brattleboro Retreat*, No. 82-7598, slip op. at 2131 (2d Cir. March 1, 1983); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919 (2d Cir. 1981).

Discriminatory or disparate *treatment* in violation of the ADEA occurs when an employer treats some people

less favorably than others because of age. While proof of a discriminatory motive is critical, "it can in some situations be inferred from the mere fact of differences in treatment." *Geller v. Markham*, 635 F.2d 1027, 1031 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981). A prima facie case of discriminatory treatment under the ADEA (as under Title VII) may ordinarily be made out by meeting the four requirements set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Geller v. Markham*, *supra*, 635 F.2d at 1032; *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1014 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981). These requirements establish that the plaintiff has not suffered an adverse employment decision for either of the two most common legitimate reasons: lack of qualifications or the absence of a vacancy in the position sought. *Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 253-54; *International Brotherhood of Teamsters v. United States*, *supra*, 431 U.S. at 358 n.44; *Stanojev v. Ebasco Services*, *supra*, 643 F.2d at 919-20. Applying the *McDonnell Douglas* formula here, it is clear, as the district court held, that appellants could not establish that there were flight engineer vacancies at the time they applied to transfer.

The *McDonnell Douglas* formula, however, is "not necessarily applicable in every respect to differing factual situations," *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 803 n.13. Nor is it "an inflexible rule," *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978); *accord Texas Department of Community Affairs v. Burdine*, *supra*, 450 U.S. at 253-54 n.6; *International Brotherhood of Temasters v. United States*, *supra*, 431 U.S. at 358. We stated in a Title VII context:

> "The four *McDonnell Douglas* requirements . . . do not represent the exclusive method of showing dis-

parate treatment under Title VII. . . . [A] court need not adhere stubbornly to that case's specific formulae when common sense dictates the same result on the basis of alternative formulae." *Grant v. Bethlehem Steel Corp.*, *supra*, 635 F.2d at 1014.

See also, *Garner v. Boorstin*, 690 F.2d 1034, 1036 n.4 (D.C. Cir. 1982); *Stanojev v. Ebasco Services, Inc.*, *supra*, 643 F.2d at 920-21. A plaintiff is not barred by the *McDonnell Douglas* method from making out a prima facie case of age discrimination by alternative means, such as *direct* proof that an employer discriminates on the basis of age. *Stanojev*, *supra*, 643 F.2d at 921; see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014 & n.18 (1st Cir. 1979).

Plaintiffs in the present case took advantage of this alternative method of making out a prima facie case. Their evidence revealed that TWA grants the downgrading requests of all pilots with sufficient seniority except those of captains and first officers who reach age 60. This direct evidence of a differentiation based solely on age is sufficient to give rise to an inference of discriminatory motive, see *Geller v. Markham*, *supra*, 635 F.2d at 1031, and establishes, therefore, a prima facie case of discriminatory treatment. See *Stanojev*, *supra*, 643 F.2d at 921; *Stone v. Western Air Lines, Inc.*, 544 F. Supp. 33, 37 (C.D. Cal. 1982).[13]

TWA argues in reply that even under this alternative formula for raising an inference of discriminatory treatment appellants failed to make out a prima facie case,

[13] In light of our holding that the appellants have made out a prima facie case of discriminatory treatment under the ADEA, it is unnecessary for us to consider whether appellants could establish their discrimination claim under an alternative theory of discriminatory impact.

since most captains and first officers seeking to downbid to flight engineer positions have been successful, which negates the "critical" element of discriminatory motive. We disagree. That some captains were successful in complying with the company's discriminatory transfer policy—and then at the price of an early demotion—cannot excuse the denial of equal opportunity to other members of the protected class. Cf. *Furnco Construction Corp. v. Waters*, *supra*, 438 U.S. at 579. As the Supreme Court recently stated in *Connecticut v. Teal*, 102 S. Ct. 2525 (1982),

> "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Id.* at 2535.

Likewise, Congress never intended favorable treatment of some members of a plaintiffs' age group to excuse discrimination against others. The ADEA, like Title VII, "does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her [protected class] . . . were hired. . . . Every *individual* employee is protected against . . . discriminatory treatment. . . ." Id. (emphasis in original).[14]

TWA and ALPA rely principally on two statutory defenses to rebut appellants' prima facie case. First, TWA asserts that its contested practices are part of a bona fide seniority system and thus liability is foreclosed under 29 U.S.C. §623(f)(2). Appellants, however, do not challenge

[14] " '[T]he [substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII,' " *Geller v. Markham*, *supra*, 635 F.2d at 1032 (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978)).

the operation of the seniority system, but their summary exclusion from it at age 60. The employment practice at issue in this lawsuit—the severing of age 60 captains from the company—is in no way mandated by the negotiated seniority system. That system provides only that seniority rights shall be forfeited upon severance from the company, but it does not, and lawfully cannot, specify that pilots who attain age 60 shall be severed. See *id.* §623(f)(2) (no bona fide seniority system "shall require or permit the involuntary retirement of any individual . . . [protected under the Act] because of the age of such individual"). TWA's practice, "which equates involuntary retirement as a captain at age 60 with a complete severance from the company," *Stone v. Western*, *supra*, 544 F. Supp. at 37, is not part of a bona fide seniority system. The bona fide seniority defense is therefore unavailable to TWA as a matter of law. See *Johnson v. American Airlines, Inc.*, Nos. CA-3-80-434-D and CA-3-81-1020-D (N.D. Tex. filed Feb. 22, 1983).[15]

Second, ALPA argues that since age under 60 is a lawful BFOQ for captains to continue as such, they may be precluded from downbidding after 60 to positions for which age 60 is *not* a BFOQ, i.e., flight engineers, by §623(f)(1), which provides that "[i]t shall not be unlawful . . . to take any action otherwise prohibited under [the Act] . . . where age is a bona fide occupational qualification . . . ." In support of this position ALPA relies on an expansive reading of the phrase "take any action otherwise prohibited" which it contends is justified by the

15 Since we conclude that TWA's compliance with a bona fide seniority system cannot establish a justification under §623(f)(2) for the extinguishment of appellants' seniority at age 60, *a fortiori* the seniority system cannot establish a defense under the exception contained in §623(f)(1) for a "reasonable factor other than age."

contrasting language of another section of the statute, §623(f)(2) and by the legislative history of the statute. We cannot agree.

It is true that §623(f)(2),[16] unlike §623(f)(1), contains an explicit prohibition against involuntary retirement on the basis of age, and that in withdrawing a proposed amendment to §623(f)(1) that would have expressly allowed mandatory retirement, the Conference Committee report stated that "[t]he conferees agree that the amendment neither added to nor worked any change upon present law." H. Conf. Rep. No. 95-950, 95th Cong., 2d Sess., 7, *reprinted in* 1978 U.S. Code Cong. & Ad. News 528-29. The House Report on the ADEA also provides:

> "This legislation does not require employers to provide *special working conditions* for older workers to allow them to remain or become employed. While special jobs, part-time employment, retraining and transfers to less physically demanding jobs may be of great benefit to the older employees and the employer alike, these activities are not required by this legislation." H.R. Rep. No. 527, 95th Cong. 1st Sess. 12. (Emphasis supplied).

From this ALPA reasons that Congress was aware that when an employee ceases because of a BFOQ requirement to qualify for one type of job (captain or first officer in the present case) the employer may sever his employment completely while permitting others who are likewise un-

16 Section 623(f)(2) provides in pertinent part:

> "It shall not be unlawful for an employer . . .
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual . . . ."

qualified for different reasons to continue their employment in a downgraded capacity.

ALPA's argument is unpersuasive. The terms of §623(f)(1) plainly reveal its purpose, which is to excuse only those age-based actions against employees that are related to the "particular job" (in this case captain or first officer). The Senate Report makes this clear. S. Rep. No. 493, 95th Cong., 2d Sess., 10-11, *reprinted in* 1978 U.S. Code Cong. & Ad. News 513-14. See also H.R. Rep. No. 527, *supra*, at 12.

That age less than 60 is a BFOQ for the particular job of captain or first officer provides no license for TWA to discriminate against those over 60 who wish to transfer to positions as flight engineers, for which age 60 is *not* a BFOQ, by permitting other captains and first officers to do so. To hold otherwise would frustrate the purpose of the ADEA, which is "to promote employment of older persons" and "to prohibit arbitrary age discrimination in employment," 29 U.S.C. §621(b), and the purpose of the 1978 amendments, which is "to protect older workers from involuntary retirement, . . . to insure that older individuals who desire to work will not be denied employment opportunities solely on the basis of age." S. Rep. No. 493, *supra*, at 1, *reprinted in* 1978 U.S. Code Cong. & Ad. News 504; see also H.R. Rep. No. 527, *supra*, at 1, 2.

Because the BFOQ provision creates an exception to the statute's general prohibition against discrimination based on age, it must be narrowly construed and may be invoked only if an employer proves "plainly and unmistakably" that its employment practice meets the "terms and spirit" of the remedial legislation. *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (construing the Fair Labor Standards Act); *Orzel v. City of Wauwatosa*, 697

F.2d 743, 748 (7th Cir. 1983) (BFOQ exceptions to ADEA must be narrowly construed). ALPA's expansive reading of §623(f)(1) does not comply with these expressed purposes of ADEA. On the contrary it would create an exception that would swallow the Act. Under ALPA's interpretation, for example, a company could lawfully provide fewer retirement benefits to captains retiring at age 60 than to other retiring employees, simply because the position of captain is subject to an age 60 BFOQ. Clearly Congress did not intend to permit such a result any more than it intended to permit an age-based refusal to consider a transfer application submitted by a 60-year old downbidding captain for a flight engineer position, merely because age 60 is a BFOQ for the captain's former job, when the company permits all younger captains who can no longer serve as captains to transfer to the position of flight engineer.

The ADEA requires "that an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 725 (1983). We conclude that TWA's age-based transfer policy hindered appellants' "demotion," depriving them of the "privilege[] of [continuing] employment" after age 60 and denying them "employment opportunities" in violation of §§623(a)(1) and (a)(2) of the ADEA.

Our holding does not require TWA to provide "special working conditions for older workers to allow them to remain or become employed." H.R. Rep. No. 527, *supra*, at 12; *Parcinski v. Outlet Co.*, *supra*, 673 F.2d at 37. Appellants do not ask for "special treatment," *Parcinski*, *supra*; rather, they merely seek the same treatment accorded all younger captains and first officers who become unable to serve in their former capacities for non-age

reasons. There is nothing "special" or "preferential" about equal treatment.

Nor can TWA avoid its ADEA obligations on the ground that downgrading of captains to the position of flight engineer might in some instances involve some retraining or relocation. TWA retains and relocates all employees, including flight engineers who are over 60, except for captains and first officers who have reached 60. This action is a conscious refusal on the part of TWA to retain or relocate age 60 captains and first officers solely because of their age, in violation of the ADEA. An employer's conscious refusal to consider retaining or downgrading a plaintiff because of his age violates the Act. See, e.g., *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *EEOC v. TWA*, 544 F. Supp. 1187, 1218 (S.D.N.Y. 1982).

Nor does our holding result, as ALPA argues, in the elimination of mandatory retirement before age 70. An employer can lawfully retire an employee because he is beyond the age established as a BFOQ for his position provided that, unlike the situation here, the employer's refusal to consider the employee's request for alternative assignments is not discriminatory. *Compare Coates v. National Cash Register Co.*, 433 F. Supp. 655, 661 (W.D. Va. 1977) (termination for lack of training unlawful when employees were chosen for training on the basis of age), *with Smith v. World Book-Childcraft Int'l, Inc.*, 502 F. Supp. 96, 98-99 (N.D. Ill. 1980) (denial of transfer request by terminated employees lawful under the ADEA when no position was available and failure to transfer was not predicated on impermissible factors).[17]

17 TWA's remaining claim that no statutory violation has been established as to Captain Thurston because his contractual grievance was denied by the TWA System Board of Adjustment may be dealt with summarily. The Board's determination of Thurston's rights under the collective bargaining agreement did not resolve any issue pertaining to his claim that his forced retirement violated the ADEA. As the arbitrator expressly stated: "It must be emphasized . . . that in deciding this case, the System Board renders no opinion with respect to any *legal* rights that Captain Thurston may have under the ADEA." Joint App. 530 (emphasis in original). Cf. *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) (Title VII rights and remedies are distinct from and independent of those secured through collective bargaining).

In short, because TWA routinely accommodates other employees who seek to downgrade to flight engineer for non-age reasons and has failed to come forward with a permissible reason for its refusal to accord the same treatment to age-60 captains and first officers, the *Thurston* litigants and the EEOC claimants must prevail on their ADEA claim.[18] The sole reason for its discrimination against age-60 captains and first officers is their age; this is prohibited by the ADEA. Accordingly, we reverse and remand the case to the district court for the entry of judgment for appellants against TWA and ALPA, Fed.R.Civ.P. 56(c), as we have power to do. *Abrams v. Occidental Petroleum Corp.*, 450 F.2d 157, 165-66 (2d Cir. 1971), *aff'd sub nom. Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 482 (1973); *International Longshoremen's Ass'n, AFL-CIO v. Seatrain Lines, Inc.*, 326 F.2d 916, 921 n.2 (2d Cir. 1964).

In response to ALPA's contention that summary judgment may not be entered against it because of its status as a union, the ADEA expressly prohibits unions, not just employers, from causing or attempting to cause an employer to engage in unlawful discrimination under

18 Because we determine that TWA and ALPA have failed to come forward with a legitimate, nondiscriminatory reason for their disparate treatment of appellants, we need not consider the third step in the *Burdine* analysis, whether the defendants' reasons were pretextual.

§623(c)(3) of the ADEA. Cf. 42 U.S.C. §2000e(c)(3) (Title VII); *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 73 (2d Cir. 1982). The evidence is undisputed that ALPA caused TWA to institute the requirement that successful downbidders "fulfill their bids in a timely manner," resulting in the cancellation of bids awarded three downbidding EEOC plaintiffs who were unable to complete their training and assume positions as flight engineers before reaching age 60. (JA 1064-1066, 1069, 1074-77). Nor is it disputed that after the 1978 ADEA amendments prohibited mandatory retirement before 70 of employees in positions for which age less than 70 was not a BFOQ, ALPA negotiated, signed, and administered a Working Agreement which retained by incorporation through express reference clauses from the 1977 Retirement Plan for Pilots requiring retirement of all flight deck personnel at 60. Retirement Plan for Pilots, Articles 4.1, 4.2. When a union becomes a party to a discriminatory provision in a collective bargaining agreement binding the employer to an unlawful practice, the union's conduct in aiding and abetting the employer to discriminate against employees renders it independently liable for violation of the ADEA, 29 U.S.C. §623(c)(3). Cf. *Patterson v. American Tobacco*, 535 F.2d 257, 270 (4th Cir.) (Title VII), *cert. denied*, 429 U.S. 920 (1976); *Taylor v. Armco Steel Corp.*, 373 F. Supp. 885 (S.D. Tex. 1973) (same); Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702, 704-05 (1980).

Since ALPA actively campaigned to persuade TWA to retain its age-60 retirement policy for all flight deck positions, opposed TWA's unilateral action in August 1978 to attempt partial compliance with the ADEA and induced TWA to impose further discriminatory restric-

tions on captains seeking to downbid to flight engineer status, ALPA is liable under 29 U.S.C. §623(c)(3) to the EEOC plaintiffs who were damaged by its conduct.[19]

C. *RELIEF*

1. *TWA*

Appellants have requested an award of back pay, liquidated damages, and appropriate injunctive relief against TWA. Amended Complaint ¶1-11, Joint App., at 66-68. Liquidated or double damages, which are defined as an amount equal to the pecuniary losses sustained by way of lost wages, salary increases and other benefits, 29 U.S.C. §216(b) (incorporated by reference in *id.* §626(b)); *Koyen v. Consolidated Edison Company of New York*, 560 F. Supp. 1161, 1164 (S.D.N.Y. 1983), are available under the ADEA "only in cases of willful violations." *Id.* §626(b). Congress has provided no statutory definition of "willfulness," however, and the legislative history of the ADEA is silent on this point. *Wehr v. Burroughs Corp.*, 619 F.2d 276, 282 (3d Cir. 1980). As we indicated in *Goodman v. Heublein, Inc.*, 645 F.2d 127 (2d Cir. 1981), in a case based on discriminatory treatment, such as the present one, plaintiffs need not prove a specific intent to violate the ADEA; it is sufficient to establish that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA. *Id.* at 131. The reason is that "[i]n a discriminatory treatment

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19 Our conclusion that ALPA's actions in signing the post-1978 Working Agreements and in causing TWA to implement other restrictions on the downbidding older captains and flight engineers render it liable under §623(c)(3) makes it unnecessary for us to consider whether the First Amendment bars consideration of ALPA's liability based on its filing a lawsuit against TWA. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972).

case . . . an employer's action, if taken *because of* an impermissible factor such as age, cannot be the result of negligence, mistake, or other innocent reason." *Id.* at 131 n.6 (emphasis in original).

Applying these principles, TWA was clearly aware of the 1978 ADEA amendments; indeed it was required to post them, 29 U.S.C. §627. Its attempt to escape full compliance by authorizing restricted downbidding by captains and first officers approaching 60 does not relieve it of liability for liquidated damages based on its continued discrimination against them through these unlawful restrictions. *Goodman v. Heublein*, *supra*; *Wehr v. Burroughs Corp.*, *supra*.

2. *ALPA*

ALPA argues that the remedial scheme of the ADEA, which incorporates that of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§201-218; *Lorillard v. Pons*, 434 U.S. 575, 582 (1978), does not permit actions to recover monetary damages against a labor organization. We agree. Under the FLSA employees may bring actions to recover money damages against employers, *id.* §216(b), and the term "employer" in FLSA expressly excludes labor organizations. *Id.* §203(d). This express statutory incorporation of FLSA precludes a monetary damage award against ALPA. *Neuman v. Northwest Airlines, Inc.*, 28 F.E.P. Cases 1488, 1490-91 (N.D. Ill. 1982).

However, appellants are entitled to recover back pay, an equitable remedy, against the union. *Equal Employment Opportunity Commission v. Air Line Pilots Association, Int'l*, 489 F. Supp. 1003, 1008-10 (D. Minn. 1980), *rev'd on other grounds*, 661 F.2d 90 (8th Cir. 1981). The union owes a duty to all its members, including its over-60 members, not to discriminate against them. See *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). One of the purposes of a back pay award is to spur unions, as well as employers, to evaluate employment practices and eliminate unlawful discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

CONCLUSION

The judgment for TWA against ALPA is affirmed. The judgment in favor of TWA against Thurston and the EEOC is reversed and remanded to the district court with directions to enter judgment for appellants against TWA and ALPA and to award to each plaintiff such amount as may be found due against each defendant in accordance with this opinion, after such evidentiary hearing as may be necessary for that purpose.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I concur with the majority that the judgment in favor of Trans World Airlines, Inc. and against Air Line Pilots Association International should be affirmed. I dissent from the majority's reversal of the judgment in favor of TWA and against Thurston and the EEOC.

If I understand the basis for the latter holding, it is that pilots who reach 60 years of age are treated less favorably than younger pilots who sustain disabling injuries or whose positions are eliminated at a domicile by reductions in force. In my opinion, this is like comparing

apples with oranges. A pilot does not know in advance that he is going to break his leg or that company economies will eliminate the job he is performing. However, a pilot knows the exact date on which he will become 60 years of age and that after that date, FAA regulations will no longer permit him to work as a pilot. Unlike a disabled younger man, a healthy pilot, 60 years of age, cannot go on unpaid medical leave for up to five years. For similar reasons, a 60 year old pilot should not be entitled to take a ten year furlough from a job he is forbidden by law to perform, accruing seniority status in the process. I don't believe Congress intended that such a pilot should be permitted to take a nine-year vacation and return to work at the age of 69, displacing a younger flight engineer, who might have a spouse and family but who has less seniority.

Apparently, TWA is the only trunk airline that voluntarily has permitted pilots over 60 to continue working as flight engineers. Instead of receiving commendation for what it has done, TWA is held liable as a matter of law for age discrimination. I would affirm the judgment of the district court.

ERRATA

Page	*Line*	*Delete*	*Insert*
5448	19	monetary damages against	monetary damages, including back pay, against
5448	24	monetary damage	monetary damage or back pay
5448	26	1982).	1982) *see Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1059 n. 5 (S.D.N.Y. 1975).
5448	27	Delete entire paragraph	
5449	13-14	amount or may be found due	relief as it is entitled to

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So Ordered:

/s/ S.R. Waterman/W.R. Mansfield
U.S. Circuit Judges

810/3/83

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CONCLUSION

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of November, one thousand nine hundred and eighty-three.

Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellant,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee,

HAROLD H. THURSTON, et al., and
NICHOLAS VASILAROS, et al.,
Defendants-Intervenors Appellees.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C.A. PARKHILL,
Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor Appellant,

—v.—

TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, Air Line Pilots Association, International,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

/s/ VICTORIA C. DALTON
by Victoria C. Dalton,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the tenth day of November, one thousand nine hundred and eighty-three.

Nos. 82-6266, 82-6306, 82-6280

AIR LINE PILOT ASSOCIATION, INTERNATIONAL,
Plaintiff-Appellant,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant-Appellee,

HAROLD H. THURSTON, et al., and
NICHOLAS VASILAROS, et al.,
Defendants-Intervenors Appellee.

HAROLD H. THURSTON, CHRISTOPHER J. CLARK
and C.A. PARKHILL,
Plaintiffs-Appellants,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Intervenor Appellant,

—v.—

TRANS WORLD AIRLINES, INC., and AIR LINE PILOTS
ASSOCIATION, INTERNATIONAL,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellee, Trans World Airlines,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

/s/ VICTORIA C. DALTON
by Victoria C. Dalton,
Deputy Clerk

UNITED STATES DISTRICT COURT
S. D. NEW YORK

Sept. 13, 1982

Nos. 78 Civ. 3707 (KTD), 79 Civ. 4915 (KTD).

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Plaintiff,

—v.—

TRANS WORLD AIRLINES, INC.,
Defendant.

HAROLD H. THURSTON, et al.,
Plaintiffs,

—v.—

TRANS WORLD AIRLINES, INC., et al.,
Defendants.

Cohen, Weiss & Simon, New York City, for Air Line Pilots Ass'n, Intern.; Michael E. Abram, Jay P. Levy-Warren, New York City, of counsel.

Chadbourne, Parke, Whiteside & Wolff, New York City, for Trans World Airlines, Inc.; Donald I. Strauber, Henry J. Oechler, Jr., New York City, of counsel.

O'Donnell & Schwartz, New York City, for intervenors Vasilaros; Asher W. Schwartz, New York City, of counsel.

Haley, Bader & Potts, Chicago, Ill., Grau & Weiner, P. C., New York City, for Thurston plaintiffs; Raymond C. Fay, Alan M. Serwer, Susan D. Goland, Chicago, Ill., Leonard Grau, New York City, of counsel.

Michael Connolly, Gretchen Houston, Ivan Rivera, Jason Hegy, Paul D. Brenner, Washington, D. C., Saul Krenzel, New York City, for plaintiff-intervenor E. E. O. C.

OPINION

KEVIN THOMAS DUFFY, *District Judge*:

Airline Pilots Association, International ("ALPA"), the bargaining representative of airline pilots and flight engineers, sued Trans World Airlines, Inc. ("TWA") alleging that amendments to the Age Discrimination and Employment Act ("ADEA") did not require TWA's implementation of a policy permitting flight engineers to serve past the age of sixty. TWA has also been sued by a group of pilots and the Equal Employment Opportunity Commission ("EEOC") who claim that TWA's policy that allows flight engineers past the age of sixty to continue in TWA's employ discriminates against pilots. Both cases have been consolidated and are before me now on motions by TWA for summary judgment. For the reasons that follow, TWA's motions are granted.

I.

In 1978, Congress amended the ADEA to prohibit, *inter alia*, an employee's involuntary retirement before the age of seventy solely by reason of his age even if in accordance with a bona fide employee benefit plan.[1] Prior to this amendment, the

1 In addition to enlarging the protected age group to include sixty-five to seventy year olds, the 1978 Amendments added new language to 28 U.S.C. 623(f)(2) which reads as follows:

ADEA allowed employers to compel retirement before the age of sixty-five if this was part of a bona fide employee benefit plan and was not a subterfuge to evade the purposes of the ADEA. *See United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S.Ct. 444, 54 L.Ed.2d 402 (1977). The amended ADEA permits involuntary retirement before age seventy only where:

1. "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business",

2. "the differentiation is based on reasonable factors other than age," or

3. the forced retirement is in accordance with "a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of [the ADEA] . . .," and was not as a result "of the age of the individual." 29 U.S.C. § 623(f) (1978).

In response to this change in the law, TWA commenced a review of its July, 1977 collective bargaining agreement ("the 1977 Working Agreement") with ALPA.[2] The 1977 Working Agreement included a Retirement Plan which provided for retirement at age sixty "unless written approval of the Company is granted for continuance in employment." Sections 4.1, 4.2 of the Retirement Plan. TWA Exhibit 3. This retirement

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(f) it shall not be unlawful for an employer, employment agency, or labor organization--

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, *and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual* . . . .
(emphasis added to indicate new language).

2 New collective bargaining agreements were signed between ALPA and TWA on April, 1979 and April, 1982.

date had been in effect for many years and, in fact, for the past two decades prior to 1978 no one over the age of sixty had served in the cockpit of a TWA aircraft. Crombie Affidavit ¶ 7. This is consistent with the policy of the Federal Aviation Administration ("FAA") which since 1960 has mandated retirement at age sixty for Captains and First Officers. 14 C.F.R. § 121.383(c). Several courts have viewed this age limitation as a bona fide occupational qualification for pilots within the meaning of the ADEA, 28 U.S.C. § 623(f)(1). *See, e.g., Starr v. FAA*, 589 F.2d 307, 313 (7th Cir. 1978); *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384, 389 (C.D.Cal.1981).

The FAA has not imposed any age limitation on Flight Engineers, who are responsible for monitoring the mechanical, electrical and electronic functioning of the aircraft while it is in flight.

The 1978 ADEA amendments prompted TWA to determine whether or not members of the cockpit crew, which include on most commercial jets a Captain, a First Officer (co-pilot) and a First Engineer, fall within one of the exceptions to the new general rule that a company could not retire employees prior to age seventy. TWA met with representatives from ALPA to discuss the impact of the amendments but no consensus could be reached. On August 10, 1978, TWA went ahead and announced a new corporate policy in a bulletin to all TWA flight personnel. TWA Exhibit 5. The bulletin proclaimed "any cockpit crew member who is in a Flight Engineer status at age sixty may not be compelled to retire. The terms and conditions of employment for Flight Engineers who elect to work beyond age sixty will be governed by the provisions of the current Working Agreement." The bulletin further explained that "Flight Engineers will be subject to the provisions of the Federal Air Regulations applicable to TWA's operations and as such may not under any circumstances serve as a pilot after attaining age 60."

It is necessary to set forth TWA's implementation of this policy at some length. Flight Engineers who retired at age sixty after April 6, 1978, the effective date of the ADEA amend-

ments, were notified by letter that they would be given the opportunity to be reinstated as a Flight Engineer. Flight Engineers reaching their 60th birthday after August 10, 1978 continued in that status. Apparently, although no new "retirement date" for Flight Engineers was specifically established under TWA's new policy, it is presumed to be age seventy.

Captains seeking to become Flight Engineers in order to continue working past age sixty had to change their status to Flight Engineer pursuant to bidding procedures set forth in the Working Agreement. The Working Agreement outlines these procedures that provide a mechanism for the possible deployment of TWA's entire pilot workforce. The procedures apply to any TWA pilot, under age sixty, who seeks to change status or location. The affidavit of Joseph Bryner, the director of Flight Crew Resources for TWA, describes these procedures. A pilot wishing to change his status or his domicile files a "Standing Bid" which shows his present status and domicile and lists his preferences for a new status. *See* TWA Exhibit 19. TWA is then obligated to publish bulletins listing the available vacancies on which pilots can bid. The number of vacancies, of course, changes with TWA's staffing and contractual needs. Available TWA pilot domiciles may include New York, Chicago, St. Louis, Kansas City, San Francisco and Los Angeles. As might be expected, in any bidding situation for a vacancy, the bidders frequently outnumber the vacancies and not all bids can be accommodated. In an effort to be fair, the Working Agreement provides that in each instance the selection process is based upon a pilot's seniority at TWA. This seniority system and the bidding procedures have existed at TWA since before 1967. Of course, with the advent of the opening of Flight Engineer jobs to pilots over age sixty, the procedures have received new found attention. A TWA Captain who chooses to downbid to Flight Engineer files a bid for such a vacancy prior to his 60th birthday. "If there is such a vacancy at the domicile where a downbidding Captain has requested to be assigned and that Captain has the highest seniority, then he is granted the bid in accordance with the provisions of the Working Agreement." Bryner Affidavit ¶ 11.

After the April 6th effective date of the 1978 ADEA amendments, there was an approximate four month period during which TWA did not post any Flight Engineer vacancies. On August 18, 1978, TWA listed twelve Flight Engineer vacancies that were to become effective on or about September 1, 1978. Two captains bid for these positions and were later awarded them. After being trained for the Flight Engineer position these captains switched jobs before they reached age sixty and consequently they were not forced to retire.

According to Bryner, as of February, 1982, approximately sixty former Captains have successfully downbid to Flight Engineer and thus have served in the cockpit after age sixty. Bryner Affidavit ¶ 18. Several TWA captains, like Harold H. Thurston, who reached age sixty between April 6, 1978 and August 18, 1978 were unable to bid successfully for a Flight Engineer position. These Captains had to retire from pilot status, as required by FAA regulations, and from the company since no alternative positions became available before their 60th birthdays.

TWA's change in policy which allows Flight Engineers to continue in their jobs after age sixty, resulted in a number of lawsuits. Two of these suits are now consolidated before me. In the first case, *ALPA v. TWA*, 78 Civ. 3707, ALPA charges first that TWA's policy of allowing anyone to serve in the cockpit beyond age sixty constitutes a unilateral change in working conditions in violation of Section 6 of the Railway Labor Act ("RLA"), 45 U.S.C. § 156, and second, that ALPA is entitled to a declaratory judgment as to whether TWA's policy was required by the ADEA amendments. Certain "career" Flight Engineers[3] have intervened on the side of TWA in an effort to maintain the status quo.

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3 Career Flight Engineers are those Flight Engineers employed by TWA who were on the seniority list on June 21, 1962, the date when TWA and the Flight Engineers International Association signed a Crew Compliment Agreement granting such Flight Engineers prior rights to all Flight Engineer positions required by the Company's operations. Vasilaros Affidavit. The *Thurston* plaintiffs in their memorandum in opposition to the instant motion refer to these Flight Engineers as International Relief Officers.

In the second case, *Thurston v. TWA*, 79 Civ. 4915, several TWA Captains, including Thurston, have sued TWA alleging, *inter alia*, that TWA's mandatory retirement at age sixty is in violation of the ADEA and that ALPA and TWA have "conspired" to deprive the plaintiffs of their rights under the ADEA. In August, 1980 I permitted the EEOC to intervene in this second case to represent the interests of the many similarly situated pilots and flight engineers.[4]

II.

TWA now moves for summary judgment on the claims against it in both *ALPA v. TWA* and *Thurston v. TWA*. The intervening career Flight Engineers join in TWA's motion in *ALPA*. I will address TWA's motions in the context of each case separately.

1. *ALPA v. TWA*

The first cause of action in *ALPA v. TWA* alleges that TWA's "[e]limination of mandatory age sixty retirement for TWA flight deck crew constitutes a major change in existing terms and conditions of employment by TWA, as embodied in the Agreement and otherwise, in violation of the [Railway Labor Act], 45 U.S.C. § 152, 155 and 156." Complaint ¶ 15. The merits of this claim have already been addressed by me on a motion by ALPA to declare TWA's policy in violation of the

4 A third case, *Cafferty v. TWA*, 80 Civ. 3481, was brought against TWA in the Western District of Missouri by a group of furloughed TWA Flight Engineers alleging that they should be reinstated in their jobs pending a determination from the National Mediation Board. The *Cafferty* plaintiffs argue that TWA should be compelled to negotiate the effects of TWA's policy of allowing Flight Engineers to serve beyond age sixty under the RLA. After *Cafferty* was transferred to my docket, I granted TWA's motion to dismiss the complaint because TWA's age sixty policy did not violate the RLA as explained in an earlier decision of mine in *ALPA v. TWA*, 506 F.Supp. 236 (S.D.N.Y. 1980). In *ALPA*, I had ruled that the dispute over TWA's new policy was not a "major" dispute to which the RLA requires that its mandatory bargaining procedures be applied.

RLA. On January 26, 1981, I ruled that "a major dispute between TWA and ALPA does not exist" because "TWA's new retirement policy is neither contrary to nor inconsistent with the agreement between TWA and ALPA." 506 F.Supp. 236, 238 (S.D.N.Y. 1981). For this reason, the RLA procedures which must be followed before any action can be taken to alter existing terms and conditions of employees did not have to be followed. This reasoning is equally applicable here and leads to the conclusion that no violation of the RLA has occurred. Accordingly summary judgment is granted for TWA as to this first claim.

ALPA argues that in any event this court should retain jurisdiction over the RLA claims pending resolution of issues now before the TWA Pilot's System Board of Adjustment. *Cf. Order of Railway Conductors v. Pitney*, 326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. 318 (1946). Four grievances are currently pending before the System Board which challenge the contractual right of TWA, under both the 1977 and 1979 working agreements, to employ flight engineers older than sixty. ALPA has placed these grievances in inactive status in order to obtain a judicial resolution of the claim by TWA that the ADEA precludes the forced retirement of flight engineers older than sixty. Under the circumstances, it appears that resolution of the parties' "minor dispute" is best left in the hands of the System Board as contemplated by the RLA. *See Rutland Railway Corp.*, 307 F.2d 21, 32 (2d Cir. 1962), *cert. denied*, 372 U.S. 954, 83 S.Ct. 949, 9 L.Ed.2d 978 (1963). No purpose would be served by this court retaining jurisdiction over this claim which has already been determined to be a minor dispute.

ALPA's second claim raises more subtle issues which call for an interpretation of the ADEA and strike to the heart of this entire controversy. ALPA seeks a declaratory judgment that the ADEA does not require TWA to retain Flight Engineers beyond the age of sixty. ALPA submits that the Working Agreement defines all TWA flight deck crew members as pilots and requires that all TWA pilots possess a currently effective commercial pilot's certificate and other pilot qualifications. Complaint ¶ 24. As a result, the FAA's regulation that no

person may serve as a pilot on an airplane past his 60th birthday applies to all TWA flight deck crew members. Stated differently, ALPA contends that retiring Flight Engineers at age sixty is conduct protected by the ADEA's bona fide occupational qualification exception. 29 U.S.C. § 623(f)(1).

ALPA also argues that TWA may retire Flight Engineers at sixty because such a policy is not covered by the 1978 amendment to the ADEA which provides that no such employee benefit plan shall require or permit the involuntary retirement of any individual in the protected age group because of his age. According to ALPA, the effective date of the ADEA amendments "is deferred . . . until termination of the [Working] Agreement or January 1, 1980, whichever occurs first." Complaint ¶ 25. Thus, ALPA contends that TWA's policy of retiring Flight Engineers at sixty is protected under the old law. This latter point has been mooted by the passage of time since there is now no question that the ADEA amendments have become effective. The only issue that remains is whether Flight Engineer retirement at age sixty is a bona fide occupational qualification within the meaning of the ADEA.

The simple answer to this question is no. ALPA concedes that the FAA regulation requiring pilots to retire at age sixty applies only to the Captain and First Officer, not the Flight Engineer. ALPA's Memorandum at p. 11. The Deputy Assistant Chief Counsel of the FAA explicitly states that the regulation is not applicable to Flight Engineers who do not perform pilot "services." TWA Exhibit 42. Because the FAA has seen fit not to place Flight Engineers within the scope of the age sixty rule, ALPA cannot effectively argue that mandatory retirement at age sixty is a bona fide occupational qualification for Flight Engineers. Additional support for this proposition is found in *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. 384, 391 (C.D. Cal. 1981), where the district court faced with the identical issue specifically ruled that retirement at age sixty "is not a bona fide occupational qualification . . . ."

ALPA's arguments to the contrary are unpersuasive. First, ALPA asserts that the distinctions in responsibility between the

pilot, the co-pilot and the flight engineer are minimal. In a report by the Institute of Medicine, it was stated that the responsibilities of these three persons who occupy an airplane's cockpit "are specific but overlap considerably, and all involve tasks of information gathering, problem solving, decision making, psychomotor coordination, and transmission of information to the other components of a complex man-machine system." ALPA Exhibit J at p. 21. Thus, ALPA argues Flight Engineers need to have the same qualifications as pilots and should also be subject to the same age limitations.

Second, ALPA submits that the medical bases for the FAA age sixty rule for pilots has equal application for Flight Engineers as indicated by the greater number of Flight Engineer trainees over age sixty than under age sixty who failed to qualify for these positions.

Third, ALPA argues that insofar as the safety of a flight is concerned the Flight Engineer is a crucial member of the cockpit, no less so than the pilot. TWA's own flight operation department stated that the use of flight engineers younger than age sixty would be safer for TWA flight operations than using flight engineers older than sixty. *See* Frankum Deposition at 96-97, 110-111, 159, 162. Congress mandates that airlines operate their business with the 'highest degree' of care. *See Murnane v. American Airlines,* 667 F.2d 98 (D.C.Cir. 1981), *cert. denied,* ____ U.S. ____, 102 S.Ct. 1770, 72 L.Ed.2d 174 (1982). This rigorous standard, according to ALPA, gives TWA the prerogative to establish its own standards of safety and to declare age sixty a bona fide occupational qualification for Flight Engineers.

ALPA's arguments must be rejected. Neither the FAA nor TWA has determined that an age sixty retirement date is a significant safety factor in flight operations. As the Court in *Murnane* reasoned, "Courts, in our view, do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer." 667 F.2d at 101. I would add that a court should defer on this question at least in the first instance, to the expertise of the federal agency responsible for regulating safety in the

airline industry. Furthermore, despite whatever medical evidence ALPA can muster, the FAA is the expert in this area and is in a better position than this court to judge the physical demands placed upon the crew of an aircraft and the qualifications necessary to fulfill the various roles on board a plane. Although TWA may be able to create, through an independent assessment of safety risks, a bona fide occupational qualification, *see Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (1976); *Harriss v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), there is no convincing evidence in the record that TWA should do so for Flight Engineers sixty and under. Even if such evidence existed, I see nothing in the ADEA or in the Working Agreement which requires TWA to establish such a qualification.

The FAA and the National Institute of Aging are presently considering the question of requiring cockpit crew members to retire at age sixty. It is possible that at some future date ALPA's views will be vindicated by these entities. Until that time, it appears that the ADEA prevents TWA from enforcing the Working Agreement's mandatory retirement at age sixty. Accordingly, TWA's motion for summary judgment on ALPA's second cause of action is granted.

2. *Thurston and EEOC v. TWA and ALPA*

The Working Agreement's mandatory retirement age of sixty for pilots is challenged in *Thurston* as violative of the ADEA. The plaintiffs in *Thurston* are three crew members, Thurston, C. Clark and Parkhill, who were mandatorily retired by TWA at age sixty. Plaintiff-Intervenor EEOC seeks relief on behalf of all other crew members whose ADEA rights may have been violated by TWA and ALPA. These other crew members (hereinafter referred to as "EEOC claimants") may be divided into two groups—eight Captains who have been mandatorily retired by TWA, and all Captains or First Officers who were required to downgrade to the lower paying position of Flight Engineer. All of the plaintiffs assert that ALPA has caused or attempted to cause TWA to discriminate on the basis of age,

and that ALPA has discriminated against crew members based on age by, *inter alia*, failing to represent them and by limiting their employment opportunities. Finally, the *Thurston* plaintiffs contend that TWA and ALPA have retaliated against them for having challenged the instant actions.

TWA, joined by ALPA, moves for summary judgment in *Thurston* arguing that some of the plaintiffs have not demonstrated a *prima facie* case of age discrimination and that others who may have established a *prima facie* case were only victims of a nondiscriminatory bona fide seniority program. TWA also points to a ruling by the TWA System Board of Adjustment which rejected a grievance by plaintiff Thurston identical to the one he and other plaintiffs make here as proof of the failure of the plaintiffs' *prima facie* case. Finally, TWA points out that the implementation of its age sixty policy has not had a disparate impact on those pilots wishing to become Flight Engineers.

To establish a *prima facie* case of age discrimination under the ADEA a plaintiff must show:

1. he was a member of the protected age group;
2. he was terminated;
3. there was a vacancy in the position sought at the time he applied;
4. he was qualified for the position sought.

McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).[5] After the establishment of a *prima facie* case, the defendants must then "articulate some legitimate,

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5 Plaintiffs offer an alternative formulation to this *McDonnell Douglas* test, to wit:

> 1. Plaintiff possesses the basic skills necessary for the performance of the job, and
> 2. the job was filled by someone else.

This alternative is based on an ADEA case in the Second Circuit, *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 921 (2d Cir. 1981). I view the two tests as virtually identical.

nondiscriminatory reason for the employee's rejection . . . ." 411 U.S. at 802, 93 S.Ct. at 1824. A review of the various claims by the *Thurston* plaintiffs and the EEOC, along with the supporting proof, reveals that prongs one, two and four of the *McDonnell* test were facially satisfied. All of the plaintiffs and EEOC claimants are members of the protected age group, *i.e.*, between the age of forty and seventy; 29 U.S.C. § 631(a); each of them was terminated as pilots and forced to retire; most of them were "qualified for the position sought," *i.e.*, they were qualified to bid for and receive the position of Flight Engineer. For a variety of reasons none of them received a Flight Engineer job. However, a review of the circumstances underlying each individual pilot's failure to obtain the Flight Engineer job reveals that no age discrimination has occurred.

Plaintiff Thurston submitted a bid for a Flight Engineer's position in June, 1978 before his 60th birthday. This bid was rejected by the time he turned sixty because of the lack of vacancies and he was forced to retire.

Plaintiff C. Clark wrote to TWA in July, 1978, prior to his 60th birthday, stating his intention to serve as a flight crew member beyond age sixty. On August 3, 1978, TWA told Clark that subject to a change in policy he would not be able to serve as a Flight Engineer beyond age sixty and that no vacancies existed at that time.

In August, 1978 plaintiff Parkhill also made a bid for a Flight Engineer's position before reaching age sixty. This bid was rejected due to lack of vacancies.

These three plaintiffs allege that their forced retirements were the result of age discrimination as evidenced by the fact that (1) certain TWA pilots under age sixty had been permitted to switch into Flight Engineer jobs, and (2) at least two employees under the age of sixty who were not working as Flight Engineers received positions as Flight Engineers without having placed any bids.

The pilots involved in this case were denied bids and forced to retire either because there were no Flight Engineer vacancies between the time they elected to bid and the time of their 60th birthdays or because no vacancies existed between the effective

date of the ADEA amendments, April 6, 1978, and the effective date of the first Flight Engineer vacancy, September 1, 1978.[6] Two exceptions were C. Clark who declined to bid for any available Flight Engineer vacancies in accordance with the Working Agreement, and A. T. Humbles who bid on an available vacancy that was awarded, however, to someone with greater seniority. From these undisputed facts these plaintiffs and claimants cannot establish a *prima facie* case of discrimination solely because no job vacancy existed at the time they applied and were eligible for the job. TWA was legally obligated to remove these pilots at age sixty under the FAA regulations. TWA was not obligated, however, to offer these ex-pilots jobs which did not exist. To the extent jobs existed, TWA was justified in relying upon a seniority bidding system. *See Criswell v. Western Air Lines, Inc.*, 514 F.Supp. at 384.

Plaintiffs and the EEOC insist that a *prima facie* case can still be demonstrated despite the *McDonnell Douglas* formula by examining all of the evidence for either an inference of age discrimination or proof of a disparate impact. Support for these alternatives is derived from *Stone v. Western Air Lines, Inc.*, 544 F.Supp. 33 (C.D.Cal. 1982). In *Stone*, Judge Tashima, the author of *Criswell v. Western Air Lines, Inc.*, 514 F.Supp. at 384, was faced with the question of "whether age-sixty captains seeking to downbid to second officer positions may continue to retain their seniority rights after age sixty and exercise them when vacancies occur." At 35. The plaintiffs' claim in *Stone* was that pilots over sixty should be treated the same as flight deck employees who lose their jobs due to elimination of particular flights or positions, or due to medical disabilities and who are not severed from employment. These employees go on furlough or remain in a "displacement pool."

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6 Two other claimants, Enrich and John Clark, were initially awarded Flight Engineer bids but they failed to produce adequate proof at the time of training that they had passed the FAA Flight Engineer written exam. Thereafter, between the time they re-bid and their 60th birthdays there were no vacancies. TWA Exhibits 35 and 36.

The district court found that the plaintiffs had presented sufficient evidence to support a theory of discrimination. Deposition testimony of employees indicated

> "that Western routinely set aside and refused to consider the bids of captains nearing age sixty seeking second officer positions. Additionally, plaintiffs point to Western's Statement of Corporate Policy, adopted after the decision in *Criswell*, as manifesting continued intent to discriminate on the basis of age. Finally, they rely on evidence, first presented in *Criswell*, that a majority of pilot movement occurs not through bidding for vacancies but through displacement and other mechanisms. This point is underscored by evidence that Western and ALPA signed a special agreement, outside of the regular Pilot Agreement, for the sole purpose of maintaining the employee status of 737 second officers whose positions had been eliminated. No such efforts were made to accommodate age-sixty captains seeking second officer position."

At 36. From this evidence, the court concluded that only age-sixty captains seeking to downbid were severed while other employees were not. It was found that this established a *prima facie* case of discriminatory treatment. In addition, the court found evidence of a disparate impact in the company's program adopted outside of the Pilot Agreement for the 737 Second Officer Pool.

Although I do not subscribe to much of the court's reasoning in *Stone,* I find that it is distinguishable from the case at bar. The *Thurston* plaintiffs and EEOC claimants have not pointed to any evidence from which discriminatory treatment can be inferred. Plaintiffs do assert that other crew members move from one position to another without a "bid" and without regard to whether there is an existing "vacancy." This includes instances where pilots downgrade to Flight Engineer due to medical, training, disciplinary, or proficiency factors. Furthermore, Flight Engineers can simply stay in their jobs past age sixty without regard to the amount of bids and vacancies outstanding. Also, because the pilots must receive a

bid for Flight Engineer before they reach age sixty or else retire, pilots who wish to avoid mandatory retirement are required to take an involuntary demotion before they reach age sixty.

I do not believe, however, that these practices constitute the discriminatory treatment found in *Stone*. There is no evidence here of a separate agreement between the union and the airline whereby a certain group of pilots maintain an employee status beyond age sixty while others do not. TWA is entitled to have a seniority system for each position in the cockpit. As will be discussed, TWA is following this seniority system in a nondiscriminatory fashion. The fact that pilots with medical problems may be downgraded to Flight Engineer regardless of the lack of any vacancies while pilots approaching age sixty must bid for such positions is not violative of the ADEA. Nor is TWA's forced retirement of those pilots who reach sixty at a time when there are no vacancies illegal. Although such a rule may seem harsh, it is applied impartially, unlike the situation in *Stone,* and is pursuant to a bona fide seniority system. TWA was not obligated to offer plaintiffs positions that did not exist, *see Criswell v. TWA,* 514 F.Supp. at 391, n.13, nor was it obligated to keep them on as dormant employees until openings in the Flight Engineer status arise. TWA did not afford such a privilege to other employees and it cannot be violative of the ADEA for TWA not to do so for pilots over age sixty. The 1978 ADEA amendments were not designed to compel employers "to provide special working conditions for older workers to allow them to remain or become employed." H.R.95-527, p.12. Rather, the amendments require that "an employee's age be treated in a neutral fashion, neither facilitating nor hindering advancement, demotion, or discharge." *Parcinski v. Outlet Co.,* 673 F.2d 34, 37 (2d Cir. 1982). TWA has met these obligations.

The ADEA provides that an employer may take action to observe the terms of a bona fide seniority system which is not a subterfuge to evade the purposes of the ADEA and which "does not require or permit the involuntary retirement" prior to age seventy. 29 U.S.C. § 623(f)(2). *See EEOC v. Home*

Insurance Co., 672 F.2d 252, 257 (2d Cir. 1982). The bidding procedures under the Working Agreement follow a seniority system which was instituted for nondiscriminatory reasons and is applied in a neutral manner. *See Cates v. Trans World Airlines, Inc.*, 561 F.2d 1064, 1074 (2d Cir. 1977). The seniority system was instituted well before the effective date of the ADEA amendments and is not in any way predicated upon age; rather, it depends solely on length of service with the company. Thus, any denial of Flight Engineer status to pilots resulted from the neutral application of this bona fide seniority system and not by discriminatory treatment on the basis of age. Their forced retirement at age sixty was due solely to their reaching that age while in the pilot status. As earlier stated, age sixty is a bona fide occupational qualification for airline pilots by virtue of the FAA regulations. *See Starr v. FAA*, 589 F.2d at 313; *Criswell*, 514 F.Supp. at 389. TWA properly complied with the terms of the Working Agreement and the FAA regulations.[7]

Finally, the plaintiffs and EEOC claimants assert that they have established, or could establish through additional discovery, a *prima facie* violation of the ADEA by a showing of disparate impact upon them. They cite in support of this proposition *Geller v. Markham*, in which the Second Circuit found that the disparate impact resulting from an employer's facially neutral practice was sufficient to establish a *prima facie* case of an ADEA violation. 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981). This argument, however, also must fail. Disparate

7 Plaintiffs' argument that TWA may not raise this point on this motion is specious. Although a defense under 29 U.S.C. § 623(f)(2) was not raised in TWA's answer, plaintiffs have been made aware of it by TWA's counsel's response to plaintiffs' interrogatories on April 15, 1981. TWA Exhibit 47, p. 4. Thus, TWA can amend its answer under Fed.R.Civ.P. 15. To the extent that my decision on this motion rests on this defense, plaintiffs are not prejudiced thereby. Plaintiffs have had adequate opportunity through discovery since at least April, 1981, to develop any reply to this defense.

impact alone, does not establish an ADEA *prima facie* case, when, as here, a seniority system is involved.[8]

Geller requires "that [the] principles with respect to discriminatory racist impact in violation of Title VII . . . govern age discrimination cases instituted under [the ADEA, because] . . . 'the (substantive) prohibitions of the ADEA were derived in *haec verba* from Title VII.' " *Id.* at 1032, *quoting Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978). The Supreme Court, in a recent Title VII case addressed itself to a seniority system such as the one involved here, and expressly stated that "discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *American Tobacco Co. v. Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 71 L.Ed.2d 748 (1982). The claimants, however, failed to present any evidence of discriminatory intent, and, in fact, did not even allege the existence of any such intent. Accordingly, TWA and ALPA's motion for summary judgment in *Thurston* is granted.

III.

In sum, TWA's motion for summary judgment in both *ALPA v. TWA*, 78 Civ. 3707 (KTD) and *Thurston v. TWA*, 79 Civ. 4915 (KTD) is granted. The complaints are dismissed.

SO ORDERED.

8 Moreover, the court notes that TWA provided evidence that virtually precludes a finding of disparate impact. For example, according to unrebutted evidence, eighty-three percent of those Captains seeking to serve beyond age sixty after April 6, 1978 have served or are now serving as Flight Engineers. It is not, however, necessary to address this issue absent any evidence of TWA's intent to cause disparate impact.